

## **When Forums Collide: The San Francisco BART as a Battleground for the First Amendment in the Internet Era**

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**Abstract:** On August 11, 2011, during a year of protests around the world, a group of activists tried to organize a spontaneous protest against a San Francisco transit agency through Twitter. Unbeknownst to them, the transit agency had been informed of their plans, and planned to preempt the protest. For the first time in the United States, a state actor shuttered Internet access to prevent an anti-government demonstration. It succeeded; the protest did not materialize. Mere months after Egyptian dictator Hosni Mubarak tried to silence the thousands in Tahrir Square who wanted him gone, the agency known as the San Francisco Bay Area Rapid Transit (BART) did the same.

As the Internet continues to augment traditional forms of speech and protest through social media, it compels a serious reconsideration of First Amendment jurisprudence. The incident on August 11, however, highlights how the public forum doctrine—which prescribes how much the government may restrict speech on public property—is absurd to apply in the Internet era.

This Article argues that the BART shutdown of cell phone service, as shoehorned into the public forum doctrine, serves as a perfect example of the doctrine's failings. Examined conventionally, the shutdown was mere enforcement of the government's existing restrictions on the

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limited public forum of the train platform. Examined through the Internet forum, the shutdown was an unabashed infringement of free speech rights in a designated open public forum. No court would look at the incident through the lens of two different forums; yet to select the conventional method would be to ignore the protesters' actual method of speech, which was through the Internet. Instead, the shutdown should compel an overhaul of the public forum doctrine, by dispensing with its convoluted and poorly defined forum categories, minimizing its reliance on governmental intent, and reconceptualizing what "traditional" forums for speech should mean.

*"Governments of the Industrial World, you weary giants of flesh and steel, I come from Cyberspace, the new home of Mind. On behalf of the future, I ask of the past to leave us alone. You are not welcome among us. You have no sovereignty where we gather. . . . Your legal concepts of property, expression, identity, movement, and context do not apply to us. They are all based on matter, and there is no matter here."*<sup>1</sup> — John Perry Barlow

## I. THE YEAR OF THE PROTEST

Mere hours before the nation would celebrate the anniversary of its independence in 2011, Charles Hill was shot and killed by a police officer working for the San Francisco Bay Area Rapid Transit (BART), the city's commuter rail transit system.<sup>2</sup> Mr. Hill was a homeless man who, according to police, "appear[ed] inebriated [and] was armed with a bottle and [at least one] knife" in the Civic Center station.<sup>3</sup> When Mr. Hill "[re]acted aggressively" toward the two police officers

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<sup>1</sup> John Perry Barlow, *A Declaration of the Independence of Cyberspace*, ELEC. FRONTIER FOUND. (Feb. 8, 1996), <http://projects.eff.org/~barlow/Declaration-Final.html>.

<sup>2</sup> Mr. Hill was shot on July 3, 2011, at 9:45 p.m. on a Sunday evening. Zusha Elinson & Shoshana Walter, *Latest BART Shooting Prompts New Discussion of Reforms*, N.Y. TIMES, July 16, 2011, <http://www.nytimes.com/2011/07/17/us/17bcbart.html> [hereinafter *Discussion of Reforms*]. See also Zusha Elinson, *Witness: Man Shot by BART Police Was Not 'Running or Lunging' at Officers*, BAY CITIZEN (July 6, 2011, 7:51 PM), <http://www.baycitizen.org/transportation/story/witness-man-shot-bart-police-running> [hereinafter *Man Shot by BART Police*].

<sup>3</sup> *Discussion of Reforms*, *supra* note 2. See also Zusha Elinson, *Coroner IDs Man Shot by BART Police*, BAY CITIZEN (July 7, 2011, 4:40 PM), <http://www.baycitizen.org/transportation/story/coroner-ids-man-shot-bart-police> [hereinafter *Coroner*].

approaching him, one officer shot him three times within 25 seconds of arriving on the scene.<sup>4</sup> The shooting, which occurred on a relatively active platform moments after a train had disembarked passengers,<sup>5</sup> caused immediate backlash.<sup>6</sup> Eyewitnesses said Mr. Hill “just looked like a drunk hippie” and that the police should have reached for a Taser instead of a gun.<sup>7</sup>

It was not the first time that a police officer had shot and killed a man on the train platform,<sup>8</sup> but members of the local community vowed to ensure that this was the last time the BART police would use such violent measures on the San Francisco transit system. A week later, on July 11, 2011, activists “storm[ed] the platform[s] at BART’s Civic Center station,” which delayed 95 different trains for up to 30 minutes.<sup>9</sup> They demanded that BART dissolve its police department.<sup>10</sup> The protests effectively shut down the Civic Center, Powell Street, and

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<sup>4</sup> *Discussion of Reforms*, *supra* note 2; *Coroner*, *supra* note 3; Zusha Elinson, *BART Officer Killed Man 25 Seconds After Arriving on Scene*, BAY CITIZEN (July 21, 2011, 7:10 PM), <http://www.baycitizen.org/bart-police-shooting/story/bart-officer-killed-man-25-seconds-after> [hereinafter *BART Officer Killed Man*].

<sup>5</sup> BARTable, *Security Camera Video of Civic Center Platform 1 July 3, 2011*, YOUTUBE (July 21, 2011), <http://www.youtube.com/watch?v=R85Vf259BY>. The BART police later released security camera footage, showing that the officer who fired the fatal shots “had a Taser in his belt,” but did not reach for it. *Id.*; Zusha Elinson, *BART Officer Killed Man*, *supra* note 4.

<sup>6</sup> *See Discussion of Reforms*, *supra* note 2.

<sup>7</sup> *Man Shot by BART Police*, *supra* note 2.

<sup>8</sup> In fact, “BART officers have shot and killed six people since the agency was founded in 1972; three of the shootings occurred [between 2008 and 2011].” *Discussion of Reforms*, *supra* note 2. Most recently in 2009, an unarmed man named Oscar Grant was shot and killed by a BART officer, who was subsequently found guilty of involuntary manslaughter. *See Violence After California Police Shooting Trial Verdict*, BBC NEWS (July 9, 2010, 9:12 AM), <http://www.bbc.co.uk/news/10565543>.

<sup>9</sup> Zusha Elinson, *BART Protest Snarls Evening Commute*, BAY CITIZEN (July 11, 2011, 8:09 PM), <http://www.baycitizen.org/transportation/story/bart-protesters-snarl-evening-commute> [hereinafter *BART Protest Snarls Evening Commute*]; Will Reisman, *As Criticism Mounts, BART Stays the Course*, S.F. EXAMINER, Aug. 16, 2011, <http://www.sfexaminer.com/local/2011/08/criticism-mounts-bart-stays-course>. *See* Manny Orteiz, *BART Civic Center Station shutdown/protest*, YOUTUBE (July 11, 2011), <http://www.youtube.com/watch?v=HDLAhUb6Vvc>.

<sup>10</sup> *See BART Protest Snarls Evening Commute*, *supra* note 9.

16<sup>th</sup> Street Mission stations—several of the system’s most trafficked<sup>11</sup>—as trains were ordered to proceed through without stopping.<sup>12</sup> This would be only the first of many protests that summer on the BART platforms,<sup>13</sup> and one of countless protests that would headline the worldwide news that year.<sup>14</sup> But, as history will likely show, the critical difference between the protests of 2011 and those of yesteryear may be that Internet-based social media fueled those protesters, allowing them to be heard, to rally and organize supporters, and even to topple governments.

In January 2011, tens of thousands of Egyptians occupied Cairo’s Tahrir Square for days that turned into weeks, demanding change to the iron-fisted rule that President Hosni Mubarak had maintained over the country for thirty years.<sup>15</sup> Mubarak’s initial response was to send out “legions of black-clad riot police,”<sup>16</sup> but the tear gas and rubber bullets did not deter the protesters.<sup>17</sup> They hijacked

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<sup>11</sup> In 2010, the Powell Street and Civic Center Stations were the third and fourth most trafficked stations out of 44 total stations with 24,676 and 18,432 weekday average exits. The 16th Street Mission Station was ninth most trafficked with 10,546 weekday average exits. All three maintained a similar same number of exits in 2011. *BART Average Weekday Exits by Station*, BAY AREA RAPID TRANSIT, available at <http://www.bart.gov/sites/default/files/docs/FY%20Avg%20Wkdy%20Exits%20by%20Station.xlsx> (last visited Mar. 29, 2014).

<sup>12</sup> Michael Cabanatuan, *BART Admits Halting Cell Service to Stop Protests*, S.F. CHRON. (Aug. 12, 2011, 2:49 PM), <http://www.sfgate.com/news/article/BART-admits-halting-cell-service-to-stop-protests-2335114.php> [hereinafter *Halting Cell Service*].

<sup>13</sup> See Shawn Gaynor, *Waves of Protest Pound at BART, Shutting Down Stations*, S.F. BAY GUARDIAN (Aug. 15, 2011, 7:35 PM), <http://www.sfbg.com/politics/2011/08/15/waves-protest-pound-bart-shutting-down-stations>.

<sup>14</sup> See John Harris, *Global Protests: Is 2011 a Year That Will Change the World?*, THE GUARDIAN (Nov. 15, 2011, 3:00 PM), <http://www.guardian.co.uk/world/2011/nov/15/global-protests-2011-change-the-world>.

<sup>15</sup> Kareem Fahim & Mona El-Naggar, *Violent Clashes Mark Protests Against Mubarak’s Rule*, N.Y. TIMES (Jan. 25, 2011), <http://www.nytimes.com/2011/01/26/world/middleeast/26egypt.html>; Charles Levinson & Matt Bradley, *Egypt’s Regime on the Brink: Mubarak Digs In as Mobs Battle Police*, WALL ST. J. (Jan. 29, 2011, 12:01 AM), <http://online.wsj.com/article/SB10001424052748703956604576109323492986438.html>.

<sup>16</sup> Levinson & Bradley, *supra* note 15.

<sup>17</sup> *Id.*

government vehicles and set fire to government buildings.<sup>18</sup> As the seemingly unstoppable protesters grew in force, even joined by many of Mubarak's own police, the government shut off cell phone and Internet access.<sup>19</sup> By doing so, Mubarak effectively extinguished one of the activists' primary means of coordinating the protests.<sup>20</sup> The international community, uncertain about how to respond to the uprisings occurring in several Arab countries, feared that perhaps this would quash the protesters' momentum once and for all.

Seven months later and 2,000 miles away, riots broke out in Tottenham, North London after what began as a peaceful march against the police, in reaction to the fatal shooting of an unarmed man that had occurred days earlier.<sup>21</sup> Over one hundred rioters set fire to police cars, buses, and shops, and attempted to rush into the

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<sup>18</sup> *Id.*

<sup>19</sup> *Id.*; *How the Internet Refused to Abandon Egypt: Authorities Take Entire Country Offline*, DAILY MAIL (Jan. 30, 2011, 10:55 AM), <http://www.dailymail.co.uk/news/article-1351904/Egypt-protests-Internet-shut-hackers-message-out.html>.

<sup>20</sup> The Internet had, over the last several years, been fomenting increasing dissent to the Mubarak regime; "social media in general, and Facebook in particular, provided new sources of information the regime could not easily control." Zeynep Tufekci & Christopher Wilson, *Social Media and the Decision to Participate in Political Protest: Observations from Tahrir Square*, 62 J. OF COMM. 363, 363-64 (2012). Tufekci and Wilson's 2012 survey of about 1,000 participants of the Tahrir Square protests found that "people learned about the protests primarily through interpersonal communication through Facebook, phone contact or face-to-face conversation." *Id.* at 363. "Facebook (28.3%) was by far the most dominant means of hearing about the protests outside of face-to-face communication. [T]exting . . . was rarely the means by which someone first heard about the protests (0.8%), even though it was used widely for sharing information about the protests (46%)." *Id.* at 370. See also Shereen El Gazzar, Lilly Vitorovich, & Ruth Bender, *Egypt's Web, Mobile Communications Severed*, WALL ST. J. (Jan. 28, 2011, 4:58 PM), <http://online.wsj.com/article/SB10001424052748703956604576109661160604954.html>; Alexandra Dunn, *Unplugging a Nation: State Media Strategy During Egypt's January 25 Uprising*, 35 FLETCHER F. WORLD AFF. 15, 18-22 (2011) ("The government chose to use any means necessary to quell the communication components facilitating the uprising, and by doing so, alienated the business community in Egypt, disproportionately impacted apolitical citizens, and inadvertently increased international diplomatic attention on the crisis as a result of the government's own response.").

<sup>21</sup> *Eight Officers Hurt as Riots Erupt*, HARROW TIMES (Aug. 7, 2011, 3:16 AM), [http://www.harrowtimes.co.uk/uk\\_national\\_news/9182266.Eight\\_officers\\_hurt\\_as\\_riots\\_erupt](http://www.harrowtimes.co.uk/uk_national_news/9182266.Eight_officers_hurt_as_riots_erupt). But see Zack Whittaker, *Two-thirds of Brits Support Facebook, Twitter Shutdown in Future Riots*, ZDNET.COM (Nov. 8, 2011), <http://www.zdnet.com/blog/london/two-thirds-of-brits-support-facebook-twitter-shutdown-in-future-riots/728> ("Most Britons believe the web should be limited in times of civil unrest. But not everybody agrees; particularly the younger generation.").

Tottenham police station, armed with baseball bats, glass bottles filled with gasoline, and “makeshift missiles.”<sup>22</sup> As the chaos continued, United Kingdom Prime Minister David Cameron “consider[ed] banning suspected rioters from [using] social media sites,”<sup>23</sup> because he believed the activists were “plotting violence, disorder and criminality” through these channels.<sup>24</sup> While it may have been foreseeable for an oppressive Arab regime to suppress freedom of expression, few would have imagined that a Western government would seriously consider such an action.

Yet on August 11 that year, one month after the first BART protest, the BART police preempted an initiative by organizers to stage a larger protest, by shutting off cell phone service inside the Bay Area’s underground train stations.<sup>25</sup> The method was effective: the anticipated protest never materialized.<sup>26</sup> The action, however, immediately triggered a firestorm of criticism; in particular, accusations that the BART police had violated the protesters’ free

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<sup>22</sup> Sarah Bolesworth, Barry Neild, Peter Beaumont, Paul Lewis & Sandra Lavielle, *Tottenham in Flames as Riot Follows Protest*, THE GUARDIAN (Aug. 6, 2011), <http://www.guardian.co.uk/uk/2011/aug/06/tottenham-riots-protesters-police>. For discussion of how to regulate Internet-based incitement of flash mobs, see Hannah Steinblatt, Note, *E-incitement: A Framework for Regulating the Incitement of Criminal Flash Mobs*, 22 FORDHAM INTELL. PROP. MEDIA & ENT. L.J. 753 (2012).

<sup>23</sup> *London Riots: David Cameron Considers Banning Suspected Looters From Twitter And Facebook*, DAILY MIRROR, Aug. 11, 2011, <http://www.mirror.co.uk/news/uk-news/london-riots-david-cameron-considers-184899>.

<sup>24</sup> *Social Media Talks About Rioting ‘Constructive,’* BBC NEWS (Aug. 25, 2011, 11:31 PM), <http://www.bbc.co.uk/news/uk-14657456>. In fact, after analyzing 2.5 million riot-related Twitter messages, The Guardian concluded that the social media service had “mainly [been] used to react to riots and looting,” such as organizing street clean-up, rather than inciting the violence. Paul Lewis, James Ball & Josh Halliday, *Twitter Study Casts Doubts On Ministers’ Post-Riots Plan*, THE GUARDIAN (Aug. 24, 2011, 4:35 PM), <http://www.guardian.co.uk/uk/2011/aug/24/twitter-study-post-riot-plans>. But cf. Chris Taylor, *London Riots: BlackBerry Messenger Used More Than Facebook or Twitter*, MASHABLE (Aug. 8, 2011), <http://mashable.com/2011/08/08/london-riots-blackberry-messenger> (“[I]t soon became clear that [BlackBerry Messenger] was by far the most popular means for rioters to communicate.”). See generally Josh Halliday, *London Riots: How BlackBerry Messenger Played a Key Role*, THE GUARDIAN, Aug. 8, 2011, <http://www.guardian.co.uk/media/2011/aug/08/london-riots-facebook-twitter-blackberry> (“Police looking on Facebook and Twitter for signs of unrest spreading will have missed out – they should have watched [BlackBerry Messenger].”).

<sup>25</sup> *Halting Cell Service*, *supra* note 12.

<sup>26</sup> *Id.*

speech rights under the First Amendment.<sup>27</sup> This service disruption marked the first time that a government actor in the United States shut off Internet access in order to prevent an anti-government demonstration.<sup>28</sup> Given the growing reliance on the Internet to organize protests, and therefore the increasing likelihood that such protests will be similarly counteracted by governments in the future,<sup>29</sup>

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<sup>27</sup> See David Kravets, *San Francisco Subway Shuts Cell Service to Foil Protest; Legal Debate Ignites*, WIRED.COM (Aug. 15, 2011, 3:15 PM), <http://www.wired.com/2011/08/subway-internet-shuttering> (“[The] move by Bay Area Rapid Transit authorities was greeted by an uproar of comparisons to Egypt and Libya. . . . Some constitutional scholars are likening BART’s actions to an unlawful suppression of First Amendment speech.”); Eva Galperin, *BART Pulls a Mubarak in San Francisco*, ELEC. FRONTIER FOUND. (Aug. 12, 2011), <https://www.eff.org/deeplinks/2011/08/bart-pulls-mubarak-san-francisco>. See discussion of the shutdown’s aftermath, *infra* Part II.D.

<sup>28</sup> Kravets, *supra* note 27.

<sup>29</sup> One example of this happening globally is Libya. See Stacey Higginbotham, *Libya, BART and Tethering: Understanding the Web’s Weak Points*, GIGAOM (Aug. 22, 2011), <http://gigaom.com/broadband/libya-bart-and-tethering-understanding-the-webs-weak-points> (“We may think of Internet communication as this global network without borders, but there are still plenty of geographical borders in place thanks to how countries broadcast IP addresses and who owns the ISPs. For example in Libya, the state owns the only telecommunications provider inside the country, giving the government freedom to limit traffic both to the outside world and to areas inside the country.”). Another example is China. See James Fallows, “*The Connection Has Been Reset*,” THE ATLANTIC (Mar. 2008), <http://www.theatlantic.com/magazine/archive/2008/03/-ldquo-the-connection-has-been-reset-rdquo/6650> (“In America, the Internet was originally designed to be free of choke points, so that each packet of information could be routed quickly around any temporary obstruction. In China, the Internet came with choke points built in. Even now, virtually all Internet contact between China and the rest of the world is routed through a very small number of fiber-optic cables that enter the country at one of three points: the Beijing-Qingdao-Tianjin area in the north, where cables come in from Japan; Shanghai on the central coast, where they also come from Japan; and Guangzhou in the south, where they come from Hong Kong.”). Even in the United States, there have been discussions to give an “Internet ‘kill switch’” to President Barack Obama. Declan McCullagh, *Renewed Push to Give Obama an Internet ‘Kill Switch’*, CBS NEWS (Jan. 24, 2011, 10:12 AM), <http://www.cbsnews.com/news/renewed-push-to-give-obama-an-internet-kill-switch>.

When BART promulgated a new policy that would limit the circumstances when it could shut down cell phone service, see *infra* Part II.E, BART’s president Bob Franklin said, “This policy, with input from the Federal Communications Commission, and the American Civil Liberties Union, will serve as a pioneering model for our nation, as a reference to other public agencies that will inevitably face similar dilemmas in the future.” Press Release, BART, Extraordinary Circumstances Only for Cell Phone Interruptions (last updated Dec. 1, 2011, 1:18 PM), *available at* <http://www.bart.gov/news/articles/2011/news20111201> [hereinafter Extraordinary Circumstances Only].

BART's shutdown of cell service brings to a head the uncertain fate of the First Amendment and free speech rights in the Internet era.

Although free speech rights have already substantially evolved during the first communications revolution in the 1930s with the emergence of the radio, motion pictures, and mass publishing,<sup>30</sup> the Internet's unparalleled ease of communication further compels a serious reconsideration of First Amendment jurisprudence.<sup>31</sup> While much of the scholarly discussion has been focused on addressing the predicament of protecting free speech as conducted over the largely privately-owned Internet,<sup>32</sup> BART's shutdown of cell service presents a

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<sup>30</sup> See Samantha Barbas, *Creating the Public Forum*, 44 AKRON L. REV. 809, 809-810 (2011) (describing "the development of the public forum doctrine in the context of a larger story about the nation's efforts . . . to come to terms with its first modern crisis of communication.").

<sup>31</sup> See generally, e.g., Dan Hunter, *Cyberspace as Place and the Tragedy of the Digital Anticommons*, 91 CALIF. L. REV. 439 (2003); Eric D. Paulsrud, *Electronic Commerce in the 21<sup>st</sup> Century: Article the First Amendment on the Internet: Challenges in a New Media*, 27 WM. MITCHELL L. REV. 1637 (2001); Robert Kline, *Freedom of Speech on the Electronic Village Green: Applying the First Amendment Lessons of Cable Television to the Internet*, 6 CORNELL J.L. & PUB. POL'Y 23 (1996); David Goldstone, *The Public Forum Doctrine in the Age of the Information Superhighway (Where Are the Public Forums On The Information Superhighway?)*, 46 HASTINGS L.J. 335 (1995).

<sup>32</sup> That discussion has generally revolved around how to implicate private actors as performing state functions such that they are subject to First Amendment restrictions under the state action doctrine. See, e.g., Ronnie Cohen & Janine S. Hiller, *Towards a Theory of Cyberplace: A Proposal for a New Legal Framework*, 10 RICH. J.L. & TECH. 41, 41-43 (2003) ("On the one hand, the Supreme Court characterized the Internet as the 'most participatory form of mass speech yet developed,' while on the other hand, private networks are staking out their claims to cyber territory and suing those who interfere with their property rights. . . . [W]hile it is possible that the state's enforcement of trespass laws might constitute the state action necessary to bring a speech claim in these cases, no such state action is present where a private entity engages in discriminatory enforcement of private terms of use."); Dawn C. Nunziato, *The Death of the Public Forum in Cyberspace*, 20 BERKELEY TECH. L.J. 1115, 1116, 1135 (2005) ("In contrast to real space (which enjoys a mixture of privately-and publicly-owned places in which speech occurs) . . . speech in cyberspace occurs almost exclusively within privately-owned places. The public/private balance that characterizes real space and renders the First Amendment meaningful within it is all but absent in cyberspace. . . . Individuals whose speech has been restricted by private Internet actors have sought to extend the state action doctrine . . . to private Internet actors, and have attempted to subject such online speech regulations to First Amendment scrutiny."); Philip F. Weiss, Note, *Protecting a Right to Access Internet Content: The Feasibility of Judicial Enforcement in a Non-neutral Network*, 77 BROOK. L. REV. 383, 424-25 (2011) ("[T]he First Amendment is a protection against intrusion by the government, not by private actors. . . . Nonetheless, there is an argument that ISPs may fall directly within the parameters of the state action doctrine, in turn allowing for direct constitutional enforcement.").



different question altogether: how might a government actor—one that has voluntarily provided Internet access—be subject to the First Amendment’s protections of free speech of its users? Cities, towns, and other municipal actors have pushed for years to establish wireless or broadband access for their residents,<sup>33</sup> and while many have run into resistance from the private sector<sup>34</sup> or encountered budgetary problems, Internet access is now increasingly viewed as an essential utility no different than electricity.<sup>35</sup>

This Article discusses how the BART cell phone service shutdown has highlighted the First Amendment’s incompatibility with free speech on the Internet, and argues that the public forum doctrine is unsustainable as society increasingly relies on the Internet for communication. The public forum doctrine, which expects courts to classify places for speech into one of four types of forums, is tortured beyond recognition when applied to modern-day situations, in part due to its historical reliance on physical places for speech where clear boundaries may be drawn. Those classifications, rather than simplifying the analysis, have instead become major obstacles to more

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<sup>33</sup> *Reality Bites: American cities’ plans for ubiquitous internet access are running into trouble*, *ECONOMIST* (Aug. 30, 2007), <http://www.economist.com/node/9726651>; Mari Sibley, *Seattle Ends Free Wi-Fi*, *SMARTPLANET.COM* (May 8, 2012), <http://www.smartplanet.com/blog/thinking-tech/seattle-ends-free-wi-fi/11546>. See, e.g., WIRELESS GOVERNMENT REPORT [http://w2i.com/resource\\_center/case\\_study/case\\_study\\_search/p/type\\_continent](http://w2i.com/resource_center/case_study/case_study_search/p/type_continent) (last visited Mar. 29, 2014); MUNIWIRELESS, <http://www.muniwireless.com> (last visited Mar. 29, 2014).

<sup>34</sup> Emily Badger, *How the Telecom Lobby is Killing Municipal Broadband*, *THEATLANTICCITIES.COM* (Nov. 4, 2011), <http://www.theatlanticcities.com/technology/2011/11/telecom-lobby-killing-municipal-broadband/420>; Adi Robertson, *South Carolina Passes Bill Restricting Municipal Broadband*, *THE VERGE* (June 30, 2012), <http://www.theverge.com/2012/6/30/3128235/south-carolina-municipal-broadband-bill>.

<sup>35</sup> Broadband access in the United States is “dismal” as compared to the rest of the world by several measures. James Losey, *Denial of Service: Don’t Believe the Telecoms. Broadband Access in the United States is Worse than You Think*, *SLATE.COM* (Apr. 28, 2010, 7:03 AM), [http://www.slate.com/articles/technology/technology/2010/04/denial\\_of\\_service.html](http://www.slate.com/articles/technology/technology/2010/04/denial_of_service.html). In 2009, Congress asked the Federal Communications Commission to develop a “national broadband plan” to address this problem. See *National Broadband Plan: Connecting America*, *BROADBAND.GOV*, <http://www.broadband.gov/plan/executive-summary> (last visited Mar. 29, 2014). The battle between the private broadband companies and municipalities is reminiscent of the fight to make electricity a public utility in the 1880s. D. Stan O’Loughlin, Note, *Preemption or Bust: Fear and Loathing in the Battle Over Broadband*, 28 *CARDOZO L. REV.* 479, 482–85 (2006).

fluid development of the jurisprudence in light of rapidly changing technology.

Part II of this Article lays out the background and facts surrounding BART's shutdown of cell phone service on August 11, 2011. Part III provides an overview of the applicable First Amendment protections, including the public forum doctrine and its requisite elements of content-neutrality and ample alternative means of communication.

Part IV addresses the constitutionality of BART's shutdown by applying the public forum doctrine first to the train platform, concluding that BART acted within its constitutional limits by reasonably preventing an unsafe protest on the train platform. Part IV then applies the public forum doctrine to the forum of Internet access, concluding that BART acted unconstitutionally by restricting speakers' rights in a designated openpublic forum. This conceptual exercise encapsulates a counter-intuitiveness that demonstrates the intractable difficulty in applying the public forum doctrine to modern-day situations.

Finally, Part V discusses the inconsistency resulting from these two inquiries and the policy implications of the conflicting forums that characterize the incident. Part V then discusses how to reframe the public forum doctrine in light of Internet-based social media's rapidly growing role in the exercise of free speech in the United States.

## II. THE SAN FRANCISCO BAY AREA RAPID TRANSIT SYSTEM

The Bay Area Rapid Transit system<sup>36</sup> is a transit district<sup>37</sup> created by California's San Francisco Bay Area Rapid Transit District Act<sup>38</sup> and is overseen by a publicly elected board of directors.<sup>39</sup> BART, a heavy rail commuter system, endeavors to provide "rapid and effective transportation between the various portions of the

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<sup>36</sup> See BAY AREA RAPID TRANSIT, <http://www.bart.gov> (last visited Mar. 29, 2014).

<sup>37</sup> CAL. PUB. UTIL. CODE § 28745 (West 1973).

<sup>38</sup> CAL. PUB. UTIL. CODE § 28500 (West 1957).

<sup>39</sup> The board of directors consists of nine members, who are determined by the election districts surrounding the BART system. CAL. PUB. UTIL. CODE § 28745 (West 1957). Because the system was created by statute and managed by the California state government, BART is a government actor subject to the First Amendment of the Constitution.

metropolitan area surrounding the [San Francisco] Bay.”<sup>40</sup> Since its first day of service on Sept. 11, 1972, it has expanded throughout San Francisco and the surrounding urban and suburban areas,<sup>41</sup> seeing over 350,000 riders a day.<sup>42</sup>

#### A. *Wiring the Platforms and Trains for Internet Access*

Discussions about wiring the system for Internet and cell phone access began as early as the summer of 2001, but at first, most riders opposed the proposal.<sup>43</sup> The “widely publicized use” of cell phones to keep lines of communication open during the September 11<sup>th</sup> terrorist attacks, however, turned public opinion around,<sup>44</sup> and in 2005, BART became “the first transit system in the nation to offer wireless communication to all passengers on its trains underground.”<sup>45</sup> BART has a stated goal of providing “100 percent . . . seamless [coverage],” such that “a passenger (on a wireless device) wouldn’t know if they were aboveground or underground.”<sup>46</sup>

BART contracted out to Nextel to install the antennas, and cell phone carriers were offered the right to buy into a reimbursement

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<sup>40</sup> The state of California funded extensive studies to determine whether “interurban mass rapid transit would be a feasible instrument for reducing existing and future interurban travel problems and for relieving existing and future traffic congestion on freeways, streets and highways.” The result was the establishment of the Bay Area Rapid Transit system. CAL. PUB. UTIL. CODE § 28501 (West 1957).

<sup>41</sup> A HISTORY OF BART: THE PROJECT IS RESCUED, <http://www.bart.gov/about/history/history3.aspx> (last visited Mar. 29, 2014).

<sup>42</sup> American Public Transportation Association, *Transit Ridership Report, First Quarter 2011* (May 13, 2011), available at [http://www.apta.com/resources/statistics/Documents/Ridership/2011\\_q1\\_ridership\\_AP TA.pdf](http://www.apta.com/resources/statistics/Documents/Ridership/2011_q1_ridership_AP TA.pdf) (last visited Mar. 29, 2014).

<sup>43</sup> Michael Cabanatuan, *Cell Phones Win Backing Among BART Riders*, S.F. CHRON. (Oct. 10, 2001, 4:00 AM), <http://www.sfgate.com/bayarea/article/Cell-phones-win-backing-among-BART-riders-Views-2871329.php> [hereinafter *Cell Phones Win Backing*].

<sup>44</sup> *Id.*

<sup>45</sup> Michael Cabanatuan, *Underground, But Not Unconnected—BART Offers Wireless Service To Riders*, S.F. CHRON., Nov. 19, 2005, <http://www.sfgate.com/bayarea/article/Underground-but-not-unconnected-BART-offers-2594271.php>.

<sup>46</sup> *Id.*

contract with Nextel and pay fees to BART.<sup>47</sup> By 2008, the service included AT&T, MetroPCS, Sprint, T-Mobile, and Verizon.<sup>48</sup> In a press release, BART identified how customers were using the service:

Now whether you need to be connected for work or fun while riding BART, you'll find a continuous mobile signal for you to text, talk and surf the web on your wireless phone . . . all throughout the Oakland underground as long as you are a customer of a major wireless phone company. . . . We understand that every minute counts, and we hope that by giving you the ability to catch up on work or socialize while in our stations and onboard our trains, you'll be able to make the best use of your valuable time.<sup>49</sup>

BART did not place any apparent restrictions on its widely promoted cell phone service and Internet access, a consideration which will serve as a critical component in this Article's First Amendment analysis of the incident.<sup>50</sup> In particular, BART's continued enthusiasm about providing such unfettered access seamlessly throughout the system establishes a contentious backdrop to its decision to selectively shut off the service in order to prevent an anti-BART protest.

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<sup>47</sup> *Id.*

<sup>48</sup> Press Release, BART, Underground Cellphone Coverage On BART Expands (July 21, 2008), available at <http://www.bart.gov/news/articles/2008/news20080721b>. In August 2010, BART continued to expand its cell phone service underground, adding more access points to trains in downtown Oakland. Press Release, BART, BART Expands Wireless Network To Underground Stations In Downtown Oakland (Aug. 27, 2010), available at <http://www.bart.gov/news/articles/2010/news20100827> [hereinafter BART Expands Wireless to Downtown Oakland].

<sup>49</sup> BART Expands Wireless to Downtown Oakland, *supra* note 48. In addition to providing cell phone service, BART announced both advertisement-supported and fee-based Wi-Fi service in 2009. Press Release, BART, Wifi Rail Inc. To Provide Wifi Access On BART System (Feb. 2, 2009), available at <http://www.bart.gov/news/articles/2009/news20090202>.

<sup>50</sup> See BART Expands Wireless to Downtown Oakland, *supra* note 48. Public forum analysis emphasizes the government's intent upon creation of the forum, and the fact that they initially allowed unrestricted access but subsequently denied it to thwart an anti-BART protest is crucial in concluding that BART likely violated free speech rights.

B. *Expressive Activities Restricted on BART Property*

BART places significant restrictions on expressive activities within its property.<sup>51</sup> Its policy differentiates between the paid areas and free areas of its stations and trains, completely prohibiting expressive activity in the paid areas and requiring that speakers apply for permits to speak in the free areas.<sup>52</sup> The paid areas include “BART cars and trains and BART Station platforms,” and the policy explicitly prohibits “assemblies or demonstrations, [distribution of] written pamphlets or other materials, [and] gather[ing of] petition signatures or register[ing] voters” in those areas.<sup>53</sup> The permit for free areas may only be rejected on certain grounds, such as if the activity presents “unreasonable danger” to BART riders or employees, if it “interfere[s] with . . . the flow of passengers, divert[s] foot traffic or disrupts the orderly functioning of BART’s transportation services.”<sup>54</sup> This policy refers only to *physical* BART property,<sup>55</sup> yet served as the primary justification that BART used to defend the constitutionality of the cell phone service shutdown.<sup>56</sup>

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<sup>51</sup> BART, Rules of the San Francisco Bay Area Rapid Transit District Pertaining to Use of District Facilities for Expressive Activities, available at <http://www.bart.gov/sites/default/files/docs/Permit%20Rules%20Updated%20Feb%202014.pdf> (last updated Feb. 2014) [hereinafter Expressive Activities Policy]. Prior to the 2014 version of this policy, BART relied on a October 2005 version of the policy. The new version adds two sections placing restrictions on activity involving minors (Sections 6 and 7). It also removes from Section 5 the prohibition of “post[ing] or affix[ing]” various materials “to vehicles on BART property or facilities.” These changes are tangential to this Article.

<sup>52</sup> *Id.*

<sup>53</sup> *Id.* (“The ‘Paid Areas’ of BART Stations (where access is available only to ticketed passengers) shall be reserved for ticketed passengers who are boarding, exiting or waiting for BART cars and trains, or for authorized BART personnel.”).

<sup>54</sup> *Id.* (“In furtherance of its function as a provider of public transportation, the District intends that its property and facilities be used for public transit related activities.”).

<sup>55</sup> *Id.* In the aftermath of the 2011 incident, BART relied on the October 2005 version of the policy. *See supra* note 51.

<sup>56</sup> The anticipated location of the protest was on train platforms, a “Paid Area” on BART property. The long-standing policy on restricting free speech in those Paid Areas indicates that the government actor did not intend for train platforms to be a designated public forum. Thus, because the train platform is a limited or non-public forum, the protesters’ speech would not be constitutionally protected. *See* discussion of limited forums, *infra* Part III.C.3, and discussion of the train platform as a limited forum, *infra* Part IV.B.

C. *The August 11 Protest and The BART Police's Response*

The protest on July 11, 2011, with approximately 50 participants, had caused severe disruptions to train service and posed significant safety concerns.<sup>57</sup> Protesters “marched around the Civic Center platform shouting ‘no justice, no peace,’” as they “blocked a [train] doorway for 10 minutes, and shoved BART security guards who tried to corral them.”<sup>58</sup> One protester climbed on top of the train car before he was pulled back down.<sup>59</sup> Commuters hoping to bypass the delays ended up overcrowding the nearby Powell Street Station, which was also shut down.<sup>60</sup> The entire transit system was delayed for more than three hours.<sup>61</sup>

To mark one month since the previous protest, the organization *No Justice No Bart*<sup>62</sup> published a blog post several days prior, asking people to meet at Civic Center Station on August 11:

As before, we will be meeting in the station, ON the platform. Please do not have any signs or banners visible as you enter the station or wait on the platform, as we wish to remain inconspicuous until the action begins at 5 p.m. . . . [Activists should] try to mobilize without public announcement beforehand. This will allow us the element of surprise, and BART will not be able to call in their police force to harass our event.<sup>63</sup>

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<sup>57</sup> *BART Protest Snarls Evening Commute*, *supra* note 9. See discussion of impact of protest, *supra* text accompanying notes 9-12.

<sup>58</sup> Kelly Zito, *BART Protest Causes Major Delays in Service*, S.F. CHRON., (July 12, 2011, 8:39 PM), <http://www.sfgate.com/bayarea/article/BART-protest-causes-major-delays-in-service-2354913.php>. See video of the protest, Manny Ortez, *supra* note 9.

<sup>59</sup> Zito, *supra* note 58.

<sup>60</sup> *Id.*

<sup>61</sup> *BART Protest Snarls Evening Commute*, *supra* note 9.

<sup>62</sup> This is an unincorporated association that does not appear to have any named leadership. See NO JUSTICE NO BART, <http://nojusticenobart.blogspot.com> (last visited Mar. 29, 2014); though they appear more active on their Twitter.com account, see TWITTER NOJUSTICE NO BART, <http://www.twitter.com/nojusticenobart> (last visited Mar. 29, 2014).

<sup>63</sup> Demian Bulwa & Justin Berton, *BART On High Alert, But No Protests Yet*, S.F. CHRON. (Aug. 12, 2011, 6:18 PM), <http://www.sfgate.com/bayarea/article/BART-on-high-alert->

The post indicated “more instructions would be issued electronically just before the demonstration was to start.”<sup>64</sup> BART officials learned of the blog post and “asked employees for all ideas, ‘good or bad, constitutional or unconstitutional,’”<sup>65</sup> to thwart it.

On August 11, the morning of the anticipated protest, “[a]t 2:20am . . . BART spokesman Linton Johnson fired off an email to the transit agency’s top police officials suggesting that they shut off cell phone service to foil a protest planned for later that day.”<sup>66</sup> Three hours later, BART’s deputy police chief agreed to the plan,<sup>67</sup> and less than four hours after that, police officials briefed BART’s Board of Directors and took steps to implement it.<sup>68</sup>

That afternoon at 4 p.m., BART powered down the antenna nodes for three hours and notified the cell phone carriers.<sup>69</sup> This did not

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but-no-protests-yet-2335600.php (emphasis in original). The original post has since been taken down but was re-posted by a third party. Andrew Dalton, *BART Protest Updates: Demonstration Planned for Civic Center Station at 4:30 P.M. Today*, SFIST.COM (Aug. 11, 2011, 12:25PM), [http://sfist.com/2011/08/11/bart\\_protest\\_updates\\_protestors\\_des.php](http://sfist.com/2011/08/11/bart_protest_updates_protestors_des.php). The group explained the reasoning behind this method of surprise: “Our previous BART actions have been announced to BART passengers and the media beforehand, and although BART [sic] has been totally aware that they are happening, they have done nothing to warn passengers of the impending disruption, and afterwards, have blamed us and villified [sic] us in the press for the inconvenience, and threatened to crack down on our freedom of expression.” *Id.*

<sup>64</sup> Paul Elias, *BART Protests Go On Without Cell Phone Service Shutdown*, HUFFINGTON POST (Aug. 16, 2011, 9:23 PM), [http://www.huffingtonpost.com/2011/08/16/bart-protests-go-on-no-cell-shutdown\\_n\\_928248.html](http://www.huffingtonpost.com/2011/08/16/bart-protests-go-on-no-cell-shutdown_n_928248.html).

<sup>65</sup> *Id.* See Zusha Elinson, *BART Cut Cell Service on Spur of the Moment, Emails Show*, BAY CITIZEN (Oct. 11, 2011, 2:58 PM), <http://www.baycitizen.org/bart-protests/story/bart-cut-cell-service-spur-moment-emails> [hereinafter *Spur of the Moment*] (In Johnson’s email, he wrote, “It’s not like it’s a constitutional right for BART to provide mobile phone and Wifi service.”).

<sup>66</sup> *Spur of the Moment*, *supra* note 65.

<sup>67</sup> The deputy police chief said, “I like this idea. Can anyone think of a downside?” *Id.* (“The decision [to shut off the cell towers] was made on the spur of the moment with little discussion of the possible consequences.”).

<sup>68</sup> Zusha Elison, *BART: ‘We Were Within Our Legal Right’ to Shut Down Cell Service*, BAY CITIZEN (Aug. 12, 2011, 6:24 PM), <http://www.baycitizen.org/bart-police-shooting/story/bart-cell-phone-service-legal> [hereinafter *Legal Right*]. See *Spur of the Moment*, *supra* note 65.

<sup>69</sup> *Legal Right*, *supra* note 68; Press Release, BART, A Letter From BART To Our Customers (Aug. 20, 2011), available at <http://www.bart.gov/news/articles/2011/news20110820> [hereinafter Letter from BART].

affect aboveground cell phone service.<sup>70</sup> BART warned passengers of possible service disruption due to the protest, and increased its police presence.<sup>71</sup> Though no one could get cell phone service on the platforms or in the trains, 120 additional BART personnel were present with radios, while train intercoms and courtesy telephones<sup>72</sup> remained operational during the shutdown.<sup>73</sup> By 5 p.m., the time the protest was scheduled to begin, police officers with riot gear and members of the media were waiting at the Civic Center Station, but very few protesters showed up; those who did left very quickly.<sup>74</sup> The transit system encountered no service disruptions and the protest appeared to have been successfully thwarted.<sup>75</sup> A day later, BART published a statement justifying the shutdown based on “overcrowding and unsafe conditions” that would be created by a demonstration on the train platforms.<sup>76</sup>

Even as the police prepared to turn off cell phone service the morning of August 11, BART spokesperson Johnson sent out another email at 3:22 a.m. that proposed a news conference to take place the same time as the shutdown.<sup>77</sup> In the 400-word email, he suggested

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<sup>70</sup> *Legal Right*, *supra* note 68. See also Letter From BART, *supra* note 69.

<sup>71</sup> Zusha Elinson, *BART Cuts Cell Service to Foil Protest*, BAY CITIZEN (Aug 11, 2011, 11:12 PM), <http://www.baycitizen.org/blogs/pulse-of-the-bay/bart-cut-cell-service-foil-protest>.

<sup>72</sup> Courtesy telephones are generally found in public transportation hubs and they allow users reach an operator or station agent. See Press Release, BART Safety & Security: Help Us Keep BART Safe and Secure, *available at* <http://www.bart.gov/guide/safety> (last visited Mar. 29, 2014).

<sup>73</sup> Bulwa & Berton, *supra* note 63; Press Release, BART, Statement On Temporary Wireless Service Interruption In Select BART Stations On Aug. 11 (last updated Aug. 12, 2011, 1:08 PM), *available at* <http://www.bart.gov/news/articles/2011/news20110812> [hereinafter Temporary Wireless Service Interruption].

<sup>74</sup> Kravets, *supra* note 27.

<sup>75</sup> *Id.*; *Spur of the Moment*, *supra* note 65.

<sup>76</sup> Temporary Wireless Service Interruption, *supra* note 73 (“BART’s primary purpose is to provide, safe, secure, efficient, reliable, and clean transportation services. BART accommodates expressive activities that are constitutionally protected by the First Amendment to the United States Constitution . . . and has made available certain areas of its property for expressive activity.”).

<sup>77</sup> Email from Linton Johnson, BART spokesperson to Gina DeLorenzo, member of BART’s marketing department (Aug. 11, 2011, 3:22 PM), *available at* <http://www.baycitizen.org/documents/bart-email>.



that BART gather at least ten to fifteen “loyal riders” to read a detailed, personalized script denouncing the protests, adding that each rider should rehearse and be coached so that they “stick[] closely to this script.”<sup>78</sup> BART hired a car service<sup>79</sup> to take riders to and from the news conference that took place in Powell Street Station, but only one rider ended up attending.<sup>80</sup> Johnson’s deliberate staging of this pro-BART news conference, in a comparably busier station within the transit system,<sup>81</sup> is a telltale sign that BART’s intent in preventing the anti-BART protest was not purely due to safety concerns.<sup>82</sup> The night before the shutdown, Johnson had “called local television news stations . . . to trying to persuade them not to air any coverage” of the anticipated protest.<sup>83</sup> If BART’s actions were motivated even in part to suppress the anti-BART sentiment of the protesters, as this news conference and Johnson’s other actions seem to imply, then the shutdown would likely be unconstitutional.

On August 20, more than a week after the incident, the president of BART’s Board of Directors released a letter that provided more details about the shutdown.<sup>84</sup> The letter stated that BART’s policy for restricting the exercise of free speech to designated areas of its stations had been in place for over 25 years.<sup>85</sup> The BART police had received information about plans involving “color-coded teams to conduct lawless activity on the platforms,” orchestrated by the organization that had sponsored the protest on July 11.<sup>86</sup> According to

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<sup>78</sup> *Id.*

<sup>79</sup> The car service, which was not used, cost \$872 for BART. Zusha Elinson, *BART’s Media Manipulation Strategy*, BAY CITIZEN (last updated Sept. 13, 2011, 6:40 PM), <http://www.baycitizen.org/bart-protests/story/inside-barts-protest-propaganda-campaign> [hereinafter *Media Manipulation Strategy*].

<sup>80</sup> *Id.*

<sup>81</sup> *BART Average Weekday Exits by Station*, *supra* note 11.

<sup>82</sup> *Spur of the Moment*, *supra* note 65 (“[Johnson] arranged a press conference *intended to sway public perception and media coverage*, hired car service to transport ‘loyal riders’ there and back, and wrote a script for them to read from.” (emphasis added)).

<sup>83</sup> *Media Manipulation Strategy*, *supra* note 79.

<sup>84</sup> Letter From BART, *supra* note 69.

<sup>85</sup> This was presumably referring to the Expressive Activities Policy, *supra* note 51. Those designated areas did not include the train platforms. *Id.*

<sup>86</sup> Letter From BART, *supra* note 69.

the press release, activists “had been instructed to text the location of police officers so that the organizers would be aware of officer locations and response times.”<sup>87</sup> The letter reiterated that BART was concerned the protest could have “far exceed[ed] the protest of July 11,” which they believed would have presented “a serious and imminent threat to the safety of BART passengers and personnel.”<sup>88</sup>

#### D. *Aftermath*

Although BART’s action was effective in preventing the protest, it generated a backlash of criticism arguing that BART had violated the protesters’ constitutionally protected freedom of speech.<sup>89</sup> Even BART directors publicly acknowledged that missteps had been taken.<sup>90</sup> One director said about the shutdown, “My gut tells me there’s something wrong with it.”<sup>91</sup> Another director acknowledged the damaging context of BART’s actions:

It’s a touchy thing because . . . the Arab Spring, makes it look . . . more authoritarian than was the intent. . . . The intent by our police was definitely to protect our passengers. It was shown from the previous protest that it was extremely dangerous, all those people pushing and shoving.<sup>92</sup>

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<sup>87</sup> *Id.*

<sup>88</sup> *Id.*

<sup>89</sup> Kravets, *supra* note 27. See Hayley Tsukayama, *BART Transit Decides: When Is It Okay to Shut Down Cell Service?*, WASH. POST, Dec. 2, 2011, [http://www.washingtonpost.com/business/technology/bart-transit-decides-when-is-it-okay-to-shut-down-cell-service/2011/12/02/gIQAzvsTLO\\_story.html](http://www.washingtonpost.com/business/technology/bart-transit-decides-when-is-it-okay-to-shut-down-cell-service/2011/12/02/gIQAzvsTLO_story.html).

<sup>90</sup> According to a BART director, although the chief of police briefed the Board prior to the protests, the decision did not make it through the proper channels because it “wasn’t brought to [them] for discussion [even though they were] the policymakers.” Zusha Elinson, *BART Director: Cell Phone Shutdown Didn’t Go Through Proper Channels*, BAY CITIZEN (Aug. 13, 2011, 3:03 PM), <https://www.baycitizen.org/news/bart-police-shooting/bart-director-cell-phone-shutdown-didnt> [hereinafter *Proper Channels*].

<sup>91</sup> *Legal Right*, *supra* note 68.

<sup>92</sup> Matt O’Brien, *Computer Hackers Expose BART Riders’ Personal Information*, CONTRA COSTA TIMES (Aug. 14, 2011), [http://www.mercurynews.com/top-stories/ci\\_18680763](http://www.mercurynews.com/top-stories/ci_18680763).

But Johnson, the BART spokesperson who initially suggested the shutdown, reacted differently to the criticisms. He said that cell phone service “is an amenity. We survived for years without [it]. . . . Now they’re bitching and complaining that we turned it off for three hours?”<sup>93</sup>

The shutdown prompted not only severe criticism but in fact generated further calls for protests.<sup>94</sup> Most conspicuously among them, the hacker group known as Anonymous—which has latched onto a number of causes including most recently Wikileaks<sup>95</sup> and Occupy Wall Street<sup>96</sup>—encouraged people via YouTube<sup>97</sup> to show up at the Civic Center Station the following Monday.<sup>98</sup> The resulting protest caused BART to close four stations.<sup>99</sup>

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<sup>93</sup> *Proper Channels*, *supra* note 90. While discussing the possibility of a shutdown, Johnson stated in an email, “It’s not like it’s a constitutional right for BART to provide mobile phone and Wifi service.” *Spur of the Moment*, *supra* note 65.

<sup>94</sup> Gaynor, *supra* note 13 (“One protestor stood silently with a shirt that read, ‘Dear BART, you can’t take away our ability to call 911 while also making it a habit to shoot your riders.’”); Jon Brooks & Lisa Pickoff-White, *Protestors Shut Down Four BART Stations Monday*, KQED NEWS (Aug. 15, 2011, 6:15 PM), <http://blogs.kqed.org/newsfix/2011/08/15/bart-decries-hacker-attack-defends-cell-phone-shutdown>; *Anonymous Hacks SF’s MyBART Website, Thousands Of Names, Addresses & Numbers Released*, THENEXTWEB.COM (Aug. 14, 2011, 9:19 PM), <http://thenextweb.com/insider/2011/08/14/anonymous-hacks-sfs-mybart-website-thousands-of-names-addresses-numbers-released> [hereinafter *Anonymous Hacks*]; *Proper Channels*, *supra* note 90.

<sup>95</sup> See Jennifer Preston, *Social Media Gives Wall Street Protests a Global Reach*, MEDIA DECODER (Oct. 15, 2011, 3:10 PM), <http://mediadecoder.blogs.nytimes.com/2011/10/15/social-media-gives-wall-street-protests-a-global-reach>.

<sup>96</sup> See *id.*

<sup>97</sup> As well as several other online social media outlets including Twitter and Facebook. TheAnonPress, *Anonymous-Operation-BART*, YOUTUBE (Aug. 14, 2011), <http://www.youtube.com/watch?v=kL8DJ8nay5I> (“The Bay Area Rapid Transit has decided that blocking cellular communication is the correct way to scare off protesters. . . . We will show the world and BART that we will not stand for these types of actions.”).

<sup>98</sup> *Proper Channels*, *supra* note 90. Among other actions, Anonymous hacked the website *myBart.org* and released the contact information of 2,400 subscribers. *Anonymous Hacks*, *supra* note 94.

<sup>99</sup> Brooks & Pickoff-White, *supra* note 94.

### E. *BART's New Policy For Cell Phone Service Shutdowns*

In December 2011, the BART Board of Directors approved a new policy specific to its cell service that would restrict the circumstances under which they could shut it off,<sup>100</sup> pending approval from the Federal Communications Commission.<sup>101</sup> The policy required “strong evidence of imminent unlawful activity” to prompt such an interruption of the system’s cell service.<sup>102</sup> Examples of such unlawful

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<sup>100</sup> Maria L. La Ganga, *BART Officials Craft Policy for Cutting Cellphone Service*, L.A. TIMES, Aug. 25, 2011, <http://articles.latimes.com/2011/aug/25/local/la-me-0825-bart-cell-phones-20110825>.

<sup>101</sup> On August 16, 2011, the Federal Communications Commission (FCC) announced that it would be investigating the incident for possible First Amendment and statutory violations. The commission may impose fines or other punitive action on the transportation agency if it finds that such violations occurred. Sara Jerome, *FCC Probing Wireless Blocking by San Francisco Authorities*, NAT’L J. (Aug. 15, 2011), <http://techdailydose.nationaljournal.com/2011/08/fcc-probing-wireless-blocking.php>. As of April 22, 2014, the most recent update to its investigation dates back to December 2, 2011, when the FCC indicated that it had still not completed its investigation. *FCC To Review BART Cell Service Shutdown Policy*, CBS NEWS (Dec. 2, 2011), <http://www.cbsnews.com/news/fcc-to-review-bart-cell-service-shutdown-policy> [hereinafter *FCC to Review*].

BART’s actions may have violated the Communications Act of 1934, which prohibits local and state law enforcement agencies from jamming transmissions. 47 U.S.C. § 151 et seq. These potential statutory violations, however, are outside the scope of this Article. See discussion of potential Communications Act violations, Jennifer Spencer, Note, *No Service: Free Speech, The Communications Act, and BART’s Cell Phone Network Shutdown*, 27 BERKELEY TECH. L.J. 767, 794-803 (2012).

<sup>102</sup> The policy states in relevant part:

[I]t shall be the policy of the District that the District may implement a temporary interruption of operation of the System Cellular Equipment only when it determines that there is strong evidence of imminent unlawful activity that threatens the safety of District passengers, employees and other members of the public, the destruction of District property, or the substantial disruption of public transit services; that the interruption will substantially reduce the likelihood of such unlawful activity; that such interruption is essential to protect the safety of District passengers, employees and other members of the public, to protect District property or to avoid substantial disruption of public transit services; and that such interruption is narrowly tailored to those areas and time periods necessary to protect against the unlawful activity.

Extraordinary Circumstances Only, *supra* note 29. The FCC Chairman said in a statement, “Today BART took an important step in responding to legitimate concerns raised by its August 11, 2011 interruption of wireless service. As the policy BART adopted recognizes, communications networks that are open and available are critical to our democracy and economy.” Additionally, the policy included two sentences suggested by the FCC that

activity included using cell phones “(i) as instrumentalities in explosives; (ii) to facilitate violent criminal activity or endanger District passengers, employees or other members of the public . . . and (iii) to facilitate specific plans or attempts to destroy District property or substantially disrupt public transit services.”<sup>103</sup> The Board’s president said that “shutting down cell service is a necessary tool for BART to have.”<sup>104</sup>

By preempting a protest in this way, BART came under severe criticism for infringing on the free speech rights of the protesters.<sup>105</sup> The American Civil Liberties Union wrote an open letter to BART calling the shutdown a “prior restraint,”<sup>106</sup> which if true, would bear a “heavy presumption” of unconstitutionality.<sup>107</sup> The unique factual circumstances surrounding this incident, however, bring to light the significant inadequacies of the First Amendment’s public forum doctrine due to today’s increasing reliance on Internet-based social media to express dissent and organize physical demonstrations.

### III. THE FIRST AMENDMENT’S PROTECTION OF FREE SPEECH

Freedom of speech is a right protected by the First Amendment for four primary reasons: to “further self-governance, to aid the discovery

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acknowledged cutting cell phone service “poses serious risk to public safety” and should only be done when benefits outweigh the risks. *FCC To Review*, *supra* note 101.

<sup>103</sup> Extraordinary Circumstances Only, *supra* note 29.

<sup>104</sup> Travis Bickham, *BART Board Will Review Policy To Temporarily Interrupt Cell Phone Service In Stations*, DAILY CALIFORNIAN, Oct. 24, 2011, <http://www.dailycal.org/2011/10/24/bart-board-will-review-policy-to-temporarily-interrupt-cell-phone-service-in-stations>; Michael Cabanatuan, *BART Cell Phone Shutdown Rules Adopted*, S.F. CHRON., Dec. 2, 2011, <http://www.sfgate.com/bayarea/article/BART-cell-phone-shutdown-rules-adopted-2344326.php> [hereinafter *Shutdown Rules Adopted*] (“‘If we were faced with the exact same situation, we would not shut off cell phone service,’ said Bob Franklin, board president. ‘We would arrest people.’”).

<sup>105</sup> Kravets, *supra* note 27.

<sup>106</sup> This Article will not discuss prior restraint at length, as the focus is the unique nature of the August 11 shutdown and its ramifications for the public forum doctrine. See discussion of prior restraint, *infra* Part III.F.

<sup>107</sup> Letter from Abdi Soltani, Executive Director of the American Civil Liberties Union of Northern California, to Kenton W. Rainey, BART Chief of Police (Aug. 15, 2011), available at [http://www.aclunc.org/issues/technology/blog/asset\\_upload\\_file335\\_10381.pdf](http://www.aclunc.org/issues/technology/blog/asset_upload_file335_10381.pdf) (last visited Mar. 29, 2014) [hereinafter Letter from Abdi Soltani].

of truth via the marketplace of ideas, to promote autonomy, and to foster tolerance.”<sup>108</sup> In the oft-cited concurrence to *Whitney v. California*, Justice Brandeis wrote that freedom of speech is “indispensible to the discovery and spread of political truth,”<sup>109</sup> and that such a freedom “should be a fundamental principle of American government.”<sup>110</sup>

*A. Commitment to Uninhibited Debate on Public Issues*

The First Amendment provides that “Congress shall make no law . . . abridging the freedom of speech,”<sup>111</sup> and signifies that the government cannot “restrict expression because of its message, its ideas, its subject matter, or its content.”<sup>112</sup> Such expression was given protection to “assure unfettered interchange of ideas for the bringing about of political and social changes desired by the people.”<sup>113</sup> Its protections are the result of a “profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open, and that it may well include vehement, caustic, and sometimes unpleasantly sharp attacks on government and public officials.”<sup>114</sup> The First Amendment protects speech and conduct, as long as the conduct contained “[a]n intent to convey a particularized message, and . . . the likelihood was great that the message would be understood by those who viewed it.”<sup>115</sup> The First Amendment

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<sup>108</sup> Erwin Chemerinsky, *Constitutional Law: Principles and Policies* 926 (3d ed. 2006).

<sup>109</sup> *Whitney v. California*, 274 U.S. 357, 375 (1927) (Brandeis, J., concurring).

<sup>110</sup> *Id.*

<sup>111</sup> U.S. CONST. amend. I.

<sup>112</sup> *Police Dept. of City of Chi. v. Mosley*, 408 U.S. 92, 95 (1972).

<sup>113</sup> *Roth v. United States*, 354 U.S. 476, 484 (1957).

<sup>114</sup> *New York Times Co. v. Sullivan*, 376 U.S. 254, 270 (1964).

<sup>115</sup> *Texas v. Johnson*, 491 U.S. 397, 404 (1989) (quoting *Spence v. Washington*, 418 U.S. 405, 410-11 (1974)). The Court reviews the “nature of [the] activity, combined with the factual context and environment in which it was undertaken” to determine whether the speaker “engaged in a form of protected expression.” *Spence*, 418 U.S. at 409-10. *See, e.g.*, *Tinker v. Des Moines Independent Cmty. School Dist.*, 393 U.S. 503, 505-06 (1969) (where students wore black armbands to school to publicize their objections to the Vietnam War).

The actions of the protesters, whether it is the act of showing up on the train platform with signs decrying the BART shooting, or the earlier act of posting Internet-based

“embraces at the least the liberty to discuss publicly and truthfully all matters of public concern.”<sup>116</sup>

These protections are, however, not absolute,<sup>117</sup> and the Supreme Court has developed what is known as the “public forum doctrine” to determine whether speech on publicly-owned property is constitutionally protected.<sup>118</sup> The government is no different than any other private owner of property in the sense that it still maintains the “power to preserve the property under its control for the use to which it is lawfully dedicated.”<sup>119</sup> Thus, the government can prohibit access to public property if it is not found to be a public forum.<sup>120</sup> Under this doctrine, which took on its modern shape in *Perry Education Association v. Perry Local Educators’ Association*,<sup>121</sup> the Court identified several types of publicly-owned property to standardize how much the government could limit speech. Since *Perry*, the doctrine has developed into roughly four categories, distinguished primarily by the government’s original intent upon their creation: traditional public forum, designated public forum, limited public forum, and

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messages to rally and organize those protesters, would be, in context, considered by the Court as part of the same act of protected speech. This protection would be upheld because it is no different than the act of showing up for a rally and the earlier act of handing out leaflets that advertise for that rally. *See, e.g.*, *Schneider v. New Jersey*, 308 U.S. 147, 162 (1939) (The Court invalidated an ordinance which barred an appellant from distributing handbills to pedestrians, announcing a meeting to be held to discuss a war in Spain, and called the distribution of pamphlets “historical weapons in the defense of liberty.”).

<sup>116</sup> *Consol. Edison Co. of N.Y., Inc. v. Pub. Serv. Comm’n of N.Y.*, 447 U.S. 530, 534 (1980) (quoting *Thornhill v. Alabama*, 310 U.S. 88, 101-02 (1940)).

<sup>117</sup> *Hustler Magazine v. Falwell*, 485 U.S. 46, 56 (1988). *See United States v. Grace*, 461 U.S. 171, 177-78 (1983) (“We have regularly rejected the assertion that people who wish ‘to propagandize protests or views have a constitutional right to do so whenever and however and wherever they please.’”).

<sup>118</sup> *See Grace*, 461 U.S. at 177-78.

<sup>119</sup> *Adderly v. Florida*, 385 U.S. 39, 47 (1966). *See Grace*, 461 U.S. at 177-78 (“Publicly owned or operated property does not become a ‘public forum’ simply because members of the public are permitted to come and go at will.”); *Greer v. Spock*, 424 U.S. 828, 836 (1976) (reversing the lower court’s “mistake” in assuming that “whenever members of the public are permitted freely to visit a place owned or operated by the Government, then that place becomes a ‘public forum’ for purposes of the First Amendment.”).

<sup>120</sup> *Grace*, 461 U.S. at 178.

<sup>121</sup> *Perry Educ. Ass’n v. Perry Local Educators’ Ass’n*, 460 U.S. 37, 45-46 (1983).

non-public forum.<sup>122</sup> Depending on which type of forum the state has created, the court would then review the restrictions on speech according to differing levels of scrutiny, by weighing “the government’s interest in limiting the use of its property” against the interests of the speakers.<sup>123</sup> Identifying the train platform at the Civic Center Station as a traditional or alternate type of forum is then pivotal in determining whether BART’s actions on August 11 can pass constitutional muster.

Expressive activity in public forums are subject to reasonable “time, place, and manner” restrictions,<sup>124</sup> as long as those restrictions are “justified without reference to the content of the regulated speech, that they are narrowly tailored to serve a significant governmental interest, and that they leave open ample alternative channels for communication of the information.”<sup>125</sup> Such restrictions, in other words, must be content-neutral both on their face and intent. If the government’s purpose is “to suppress speech,” even if its actions *facially* appear “to be neutral as to content and speaker,” its purpose renders the restrictions unconstitutional.<sup>126</sup> A more egregious violation would be viewpoint discrimination, in which the government suppresses speech of one viewpoint while allowing the other; the First Amendment completely prohibits the government from regulating speech based on the ideology of the message.<sup>127</sup> Thus, depending on how the Court categorizes the Civic Center train platform, BART’s actions must maintain content-neutrality both *facially* and through their intent in order to be constitutional.

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<sup>122</sup> *Id.*

<sup>123</sup> *Cornelius v. NAACP Legal Def. Fund*, 473 U.S. 788, 800 (1985).

<sup>124</sup> *Martin v. City of Struthers*, 319 U.S. 141, 143 (1943) (citing *Cantwell v. Connecticut*, 310 U.S. 296, 304 (1940)).

<sup>125</sup> *Clark v. Cmty. for Creative Non-Violence*, 468 U.S. 288, 293 (1984).

<sup>126</sup> *Sorrell v. IMS Health Inc.*, 131 S.Ct. 2653, 2664 (2011).

<sup>127</sup> *Chemerinsky*, *supra* note 108, at 934. See *Rosenberger v. Rector & Visitors of Univ. of Va.*, 515 U.S. 819, 829 (1995). See discussion of content and viewpoint neutrality, *infra* Part III.D.



### B. *Time, Place, and Manner Restrictions*

The First Amendment provides that the government may “impose reasonable restrictions on the time, place, and manner of protected speech.”<sup>128</sup> The reasonableness of such restrictions is dictated by “the nature of [the] place and the ‘pattern of its normal activities’” and the Court would seek to answer whether the manner of the speech is incompatible with the functioning of the property.<sup>129</sup>

Reasonable time, place, and manner regulations have included licensing for parades, “restrictions on the hours of door-to-door solicitation, or even-handed limits on the location of sidewalk picketing,”<sup>130</sup> whereas unreasonable regulations could include excessively high licensing fees that are unfairly enforced,<sup>131</sup> or a prohibition on anonymous pamphlet distribution.<sup>132</sup> Similarly, BART’s Expressive Activities Policy requires that interested parties apply for a

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<sup>128</sup> Provided that such restrictions also comply with content neutrality, “are narrowly tailored to serve a significant government interest, and leave open ample alternative channels for communication,” as discussed *infra* Parts III.D-E. *Ward v. Rock Against Racism*, 491 U.S. 781, 791 (1989) (citing *Clark*, 468 U.S. at 293) (internal quotation marks omitted).

<sup>129</sup> *Grayned v. City of Rockford*, 408 U.S. 104, 116 (1972) (quoting Charles Alan Wright, *The Constitution on the Campus*, 22 VAND. L. REV. 1027, 1042 (1969)) (distinguishing between a silent vigil in a library and making a speech in the library’s reading room, *Brown v. Louisiana*, 383 U.S. 131 (1966)).

<sup>130</sup> William D. Araiza, CONSTITUTIONAL LAW: CASES, HISTORY & DIALOGUES 1370 (3d. ed. 2006). A Wisconsin ordinance that completely bans picketing “before or about any residence” is found to be reasonable. *Frisby v. Schultz*, 487 U.S. 474, 493-95 (1988). A complete prohibition of camping overnight in the National Mall and Lafayette Park was found to be a reasonable time, place, and manner restriction even though protesters argued that it prevented them from “demonstrating the plight of the homeless.” *Clark v. Cmnty. For Creative Non-Violence*, 468 U.S. 288, 291-92 (1984). In *Ward*, it was a reasonable manner restriction for New York City to require that performers in Central Park’s bandshell use the city’s sound equipment and technician. *Ward*, 491 U.S. at 791-92.

<sup>131</sup> *Cox v. Louisiana*, 379 U.S. 536, 558 (“It is, of course, undisputed that appropriate, limited discretion, under properly drawn statutes, or ordinances, concerning the time, place, duration, or manner of use of the streets for public assemblies may be vested in administrative officials, provided that such limited discretion is ‘exercised with “uniformity of method of treatment upon the facts of each application, free from improper or inappropriate considerations and from unfair discrimination” [and with] a “systematic, consistent and just order of treatment, with reference to the convenience of public use of the highways.”’” (quoting *Cox v. New Hampshire*, 312 U.S. 569, 576 (1941))).

<sup>132</sup> *Talley v. California*, 362 U.S. 60, 64-65 (1960).

license to engage in expressive activity within certain areas of its property.<sup>133</sup>

### C. *The Public Forum Doctrine's Four Forums*

The public forum doctrine is currently somewhat ambiguous and complex to parse,<sup>134</sup> in part due to subsequently inconsistent naming schemes since it first crystalized in *Perry*.<sup>135</sup> With the advent of the

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<sup>133</sup> See *supra* Part II.E.

<sup>134</sup> The doctrine has been severely criticized in Supreme Court dissents and by lower courts. See, e.g., *United States v. Kokinda*, 497 U.S. 720, 741 (1990) (Brennan, J., dissenting) ("I have questioned whether public forum analysis, as the Court has employed it in recent cases, serves to obfuscate rather than clarify the issues at hand. . . . Indeed, the Court's contemporary use of public forum doctrine has been roundly criticized by commentators."); *Cornelius v. NAACP Legal Def. Fund*, 473 U.S. 788, 820-26 (1985) (Blackmun, J., dissenting) ("Rather than taking the nature of the property into account in balancing the First Amendment interests of the speaker and society's interests in freedom of speech against the interests served by reserving the property to its normal use, [in using the public forum doctrine,] the Court simply labels the property and dispenses with the balancing."); *ACLU v. Las Vegas*, 333 F.3d 1092, 1099-100 (9th Cir. 2003) ("In the absence of any widespread agreement upon how to determine the nature of a forum, courts consider a jumble of overlapping factors, frequently deeming a factor dispositive or ignoring it without reasoned explanation. Consequently, courts do not always agree on the goals and proper application of forum analysis."). See also Lyrissa Barnett Lidsky, *Public Forum 2.0*, 91 B.U. L. REV. 1975, 1976, n.3 (2011); Michael J. Friedman, *Dazed and Confused: Explaining Judicial Determinations of Traditional Public Forum Status*, 82 TUL. L. REV. 929, 930 (2008) ("For such an old and well-established piece of constitutional law, it is surprising that great confusion still exists over just what property qualifies as a public forum."); Randall P. Bezanson & William G. Buss, *The Many Faces of Government Speech*, 86 IOWA L. REV. 1377, 1381 (2001) (describing public forum analysis as "an edifice now so riven with incoherence and fine distinctions that it is on the verge of collapse"); Suzanne Stone Montgomery, *When the Klan Adopts-A-Highway: The Weaknesses of the Public Forum Doctrine Exposed*, 77 WASH. U. L.Q. 557, 558 (1999) ("Four different federal courts, confronted with three substantially similar programs, approached the public forum doctrine in five different ways. . . . [T]he courts reached three different decisions regarding the type of forum at issue."); C. Thomas Dienes, *The Trashing of the Public Forum Doctrine: Problems in First Amendment Analysis*, 55 GEO. WASH. L. REV. 109, 110 (1986) ("[C]onceptual approaches such as that embodied in the nonpublic-forum doctrine simply yield an inadequate jurisprudence of labels.").

<sup>135</sup> See, e.g., Aaron H. Caplan, *Invasion of the Public Forum Doctrine*, 46 WILLAMETTE L. REV. 647, 654 (2010) ("The most confusion surrounds the phrase 'limited public forum.' When the Supreme Court first used the term, the context indicated that the Court viewed the limited public forum as a place subject to the public forum standard. After approximately 1990, the Court used the phrase 'limited public forum' to describe a place subject to the nonpublic forum standard."). See also discussion of the four forums and their relationship to each other, *infra* Parts III.C.1-5.

Internet, the challenge of classifying forums into particular categories has made the legal effects of the First Amendment even more difficult to ascertain when applied to modern-day situations.<sup>136</sup> Nevertheless, the categorization does serve to organize the discussion and provides a simple framework that can guide the evolution of the First Amendment in an era of rapidly changing modes of communication.

In the most recent Supreme Court case concerning the public forum, Justice Ginsburg named only three forums: traditional, designated, and limited.<sup>137</sup> The fourth forum, a non-public forum, is not mentioned, but constitutional scholars generally deem it to be the most restricted type of limited forum as developed in *Perry*.<sup>138</sup> What further convolutes this doctrine is that in *Perry*, the Court defined a limited public forum as “created . . . for a limited purpose such as use by certain groups . . . or for the discussion of certain subjects.”<sup>139</sup> Scholars have attempted to clarify this jurisprudence by calling limited forums a sub-category of designated forums, thereby

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<sup>136</sup> See Lidsky, *supra* note 134, at 1976, n.3.

<sup>137</sup> Christian Legal Soc’y Chapter of the Univ. of Cal., Hastings Coll. of the Law v. Martinez, 130 S.Ct. 2971, 2984 n.11 (2011). In that footnote, Justice Ginsburg wrote that designated public forums are created when “government property that has not traditionally been regarded as a public forum is intentionally opened up for that purpose”; speech restrictions in such a forum are ‘subject to the same strict scrutiny as restrictions in a traditional public forum,’ and that limited public forums are property that is “limited to use by certain groups or dedicated solely to the discussion of certain subjects.” *Id.* at 2984 n.11. In that case, a student religious organization alleged that the law school’s policy of requiring officially recognized student groups to comply with the school’s nondiscrimination policy violated the organization’s First Amendment rights to free speech. *Id.* at 2980-81. The Court found that the school’s policy was a reasonable, viewpoint-neutral one that did not violate the First Amendment. *Id.* at 2995.

<sup>138</sup> *Perry Educ. Ass’n v. Perry Local Educators’ Ass’n*, 460 U.S. 37, 49 (1983) (finding that publicly-owned property can be a non-public forum because “[i]mplicit in the concept of the non-public forum is the right to make distinctions in access on the basis of subject matter and speaker identity,” which is essentially identical to the Court’s subsequent descriptions of the limited public forum such as in *Legal Serv. Corp. v. Velazquez*, 531 U.S. 533, 543 (2001)); Marc Rohr, *The Ongoing Mystery of the Limited Public Forum*, 33 NOVA L. REV. 299, 304, 320 (2009) (discussing that in *Perry* and its subsequent cases, the “limited public forum was . . . being equated, for all intents and purposes, with the non-public forum.”).

<sup>139</sup> *Perry*, 460 U.S. at 46 n.7. See Lidsky, *supra* note 134, at 1984-85, 1988. For discussion of the confusion, see Lyrisa Lidsky, *Category Confusion and Public Forums: CLS v. Martinez*, PRAWFSBLAWG (Aug. 11, 2010, 2:27 PM), <http://prawfsblawg.blogs.com/prawfsblawg/2010/08/category-confusion-and-public-forums-clsv-martinez.html>.

simplifying it into two types of public forums: traditional and designated.<sup>140</sup> A designated forum then includes three sub-categories: (1) “open” public forums, (2) limited forums, and (3) non-public forums.<sup>141</sup> This model, given its division between traditional and designated forums, appropriately highlights the significant presumption against finding a public forum that protects the most speech.<sup>142</sup> The critical determinant for what makes publicly-owned property a certain kind of forum is the government’s intent at the forum’s creation.<sup>143</sup>

### 1. *Traditional Public Forum*

The most clearly delineated category of public forum is that of the traditional public forum, which is limited to three “quintessential” forms of public property: public streets, sidewalks, and parks.<sup>144</sup> By definitively naming these three—and only these three—types of places, the Court has shut out the possibility that other forms of property could potentially fit within it.<sup>145</sup> Traditional public forums are “open for expressive activity *regardless of the government’s intent*.”<sup>146</sup> This singular inquiry of whether a given venue is a street, sidewalk, or a

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<sup>140</sup> Lidsky, *supra* note 134, at 1984; Friedman, *supra* note 134, at 934-35.

<sup>141</sup> See discussion of how these sub-categories differ, *infra* Parts III.C.2-4.

<sup>142</sup> *Cornelius v. NAACP Legal Def. Fund*, 473 U.S. 788, 803 (1985) (The Court refuses to infer government intent “to create a public forum when the nature of the property is inconsistent with expressive activity.”).

<sup>143</sup> See *infra* Part III.C.5. But see Caplan, *supra* note 135, at 655-57 (suggesting that the public forum doctrine is overused because the Supreme Court is “curiously resistant” to stating that a given location is not a forum, “even when that seems to be the Court’s holding.”).

<sup>144</sup> *Hague v. Comm. For Indus. Orgs.*, 307 U.S. 496, 515 (1939).

<sup>145</sup> *Frisby v. Schultz*, 487 U.S. 474, 481 (1988) (“No particularized inquiry into the precise nature of a specific street is necessary; all public streets are held in the public trust and are properly considered traditional public forums.”). But see *United States v. Kokinda*, 497 U.S. 720, 727 (1990) (“The postal sidewalk at issue does not have the characteristics of public sidewalks traditionally open to expressive activity. . . . [T]he postal sidewalk was constructed solely to provide for the passage of individuals engaged in postal business. The sidewalk leading to the entry of the post office is not the traditional public forum sidewalk referred to in *Perry*.”).

<sup>146</sup> *Ark. Educ. Television Comm’n v. Forbes*, 523 U.S. 666, 678 (1998) (emphasis added).

park stands in stark contrast with how the Court defines the other categories of forums to be discussed below.

The Court justified its formulation of the traditional public forum by explaining that these are “places by which long tradition or by government fiat have been devoted to assembly and debate,”<sup>147</sup> and in *Cornelius v. NAACP*, the Court noted that such places are property that has as “a principal purpose . . . the free exchange of ideas.”<sup>148</sup> In clarifying what qualifies as “tradition,” the Court’s *Int’l Society for Krishna Consciousness v. Lee* opinion in 1992 stated that airport terminals have not “‘immemorially . . . time out of mind’ been held in the public trust and used for purposes of expressive activity,” stating that the U.S. had only 807 airports in 1930, and thus—by that fact alone—airports cannot be traditional public forums.<sup>149</sup> This analysis indicates that the Court would require that a venue be used for expressive activity for more than 60 years before seriously considering it as a possible traditional public forum.<sup>150</sup> Indeed, this high bar clashes with society’s emerging dependency on the Internet as a medium to engage in expressive activity, and the August 11 shutdown exposes just how out of touch this formulation of the public forum is with social norms.

In a traditional public forum, the government may enforce reasonable “time, place, and manner” regulations that are “content-neutral, are narrowly tailored to serve a significant government interest, and leave open ample alternative channels of communication.”<sup>151</sup> If the government “enforce[s] a content-based exclusion[,] it must show that its regulation is necessary to serve a compelling state interest and that it is narrowly drawn to achieve that end.”<sup>152</sup>

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<sup>147</sup> *Perry Educ. Ass’n v. Perry Local Educators’ Ass’n*, 460 U.S. 37, 45 (1983).

<sup>148</sup> *Cornelius v. NAACP Legal Def. Fund*, 473 U.S. 788, 800 (1985).

<sup>149</sup> *Int’l Soc. for Krishna Consciousness, Inc. v. Lee*, 505 U.S. 672, 680-81 (1992) [hereinafter *ISKCON*] (quoting *Hague*, 307 U.S. at 515).

<sup>150</sup> See discussion of *ISKCON*, 505 U.S. 672, *infra* Part IV.B.1.

<sup>151</sup> *Frisby v. Schultz*, 487 U.S. 474, 481 (1988) (quoting *Perry*, 460 U.S. at 45).

<sup>152</sup> *Id.* at 481.

## 2. Designated “Open” Public Forum

The government may also voluntarily open up public property for expressive activity by the public, designating places that do not qualify as traditional public forums for expressive activity.<sup>153</sup> Some scholars use the term “designated public forum” to label a category that includes both “open” designated public forums and “limited” public forums; open forums would be subject to the same high level of scrutiny as traditional forums, while limited forums would allow the government to define a limited range of expressive activity.<sup>154</sup> This aspect of the doctrine remains unclear due to a cryptic footnote in the Court’s *Perry* decision, which observed that the “second category” of public forum may be created “for a limited purpose.”<sup>155</sup> Despite this ambiguity, the Court has acknowledged that there are at least two types of non-traditional public forums that can be intentionally opened for expressive activity: designated and limited public forums, that differ based only on whether the government placed speech restrictions on the forum at its outset.<sup>156</sup>

Designated “open” public forums must be created “by intentionally opening a nontraditional forum for public discourse,”<sup>157</sup> and “absent [such] clear indication of government intent,” the Court will not find a public forum.<sup>158</sup> To determine the government’s intent, the Court reviews the government’s “policy and practice,”<sup>159</sup> and also considers the location and other attributes of the property, because the

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<sup>153</sup> *Perry*, 460 U.S. at 45-46. *See also* *Pleasant Grove City, Utah v. Summum*, 555 U.S. 460, 469 (2009) (“With the concept of the traditional public forum as a starting point, this Court has recognized that members of the public have free speech rights on other types of government property and in certain other government programs that share essential attributes of a traditional public forum.”).

<sup>154</sup> Lidsky, *supra* note 134, at 1981-85.

<sup>155</sup> *Id.* at 1984 (referring to *Perry*, 460 U.S. at 46 n.7) (“A public forum may be created for a limited purpose such as use by certain groups,” citing *Widmar v. Vincent*, 454 U.S. 263 (1981), or for the discussion of certain subjects, *see Madison Joint School Dist. v. Wisc. Public Emp’t Relations Comm’n*, 429 U.S. 167 (1976)).

<sup>156</sup> *See* *Christian Legal Soc’y Chapter of the Univ. of Cal., Hastings Coll. of the Law v. Martinez*, 130 S.Ct. 2971, 2984 n.11 (2011).

<sup>157</sup> *Cornelius v. NAACP Legal Def. Fund*, 473 U.S. 788, 802 (1985).

<sup>158</sup> Lidsky, *supra* note 134, at 1984.

<sup>159</sup> *Id.* at 1984 (citing *Cornelius*, 473 U.S. at 802).

“governmental interest must be assessed in light of the characteristic nature and function of the particular forum involved.”<sup>160</sup> Therefore, “the government does not create an [open] public forum by inaction or by permitting limited discourse.”<sup>161</sup> Examples of such a designated open public forum have included a municipal theatre<sup>162</sup> and a school board meeting open to the public.<sup>163</sup>

When the Court finds a designated “open” public forum, the First Amendment binds the government to the same standards of strict scrutiny as it would for a traditional public forum, even if it was not initially required to create the forum.<sup>164</sup> Although the government is not required to “indefinitely retain the open character of the facility, as long as it does” remain open, the government can only place reasonable “time, place and manner” regulations on speech.<sup>165</sup> As is the case for traditional public forums, content-based restrictions upon designated public forums “must be narrowly drawn to effectuate a compelling state interest.”<sup>166</sup> How BART has *initially* designated its property, such as its train platforms or stations, determines whether speech is constitutionally protected there. Because of its policy on expressive activity, which prohibits speech on train platforms and requires licenses to speak in certain other parts of BART stations,<sup>167</sup>

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<sup>160</sup> *United States v. Kokinda*, 497 U.S. 720, 732 (1990) (quoting *Heffron v. Int’l Soc. For Krishna Consciousness*, 452 U.S. 640, 650-651 (1981)); *ISKCON*, 505 U.S. 672, 680 (1992) (recognizing that “the location of property also has bearing because separation from acknowledged public areas may serve to indicate that the separated property is a special enclave, subject to greater restriction.”).

<sup>161</sup> *Cornelius*, 473 U.S. at 802. *See* *Ark. Educ. Television Comm’n v. Forbes*, 523 U.S. 666, 679 (1998) (“A designated open public forum is not created when the government allows selective access for individual speakers rather than general access for a class of speakers.”).

<sup>162</sup> *Southeastern Promotions, Ltd. v. Conrad*, 420 U.S. 546, 555 (1975) (“The . . . Auditorium [was a] public forum[] designed for and dedicated to expressive activities.”).

<sup>163</sup> *Madison Joint School Dist. No. 8 v. Wisc. Emp’t Relations Comm’n*, 429 U.S. 167, 174-75 (1976) (“[T]he school board meeting at which [the plaintiff] was permitted to speak was open to the public.”).

<sup>164</sup> *Pleasant Grove City, Utah v. Summum*, 555 U.S. 460, 469-70 (2009); *Perry Educ. Assoc. v. Perry Local Educators’ Assoc.*, 460 U.S. 37, 46 (1983). *See* *Widmar v. Vincent*, 454 U.S. 263 (1981).

<sup>165</sup> *Perry*, 460 U.S. at 46.

<sup>166</sup> *Id.*

<sup>167</sup> *See supra* Part II.E.

BART's physical property would likely be deemed a limited forum instead of an open public forum.

### 3. *Designated Limited Public Forum*

A third category of public forum is the limited public forum, which is created by the government for a "limited purpose such as use by certain groups, or for the discussion of certain subjects."<sup>168</sup> Examples of this forum include municipal theatres for theatrical productions (as opposed to other types of speech),<sup>169</sup> or a university student activity fund to support the university's educational goals.<sup>170</sup>

The *Perry* Court held that, due to the fact that such public property is neither by "tradition or designation a forum for public communication," limited public forums are governed by different standards.<sup>171</sup> In this forum, the government may engage in some types of content-based discrimination, both to define the limited range of expression and to maintain those limits.<sup>172</sup> These content parameters must be "reasonable in light of the purpose served by the forum" and must be viewpoint-neutral.<sup>173</sup> The government may also exclude speakers based on their subject matter, as long as it is reasonable and viewpoint-neutral.<sup>174</sup> However, if the government subsequently "excludes a speaker whose speech . . . falls within the [predetermined] subject matter constraints of the forum, [that] exclusion is subject to strict scrutiny."<sup>175</sup> Thus, the constitutionality of BART's actions

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<sup>168</sup> *Perry*, 460 U.S. at 46 n.7.

<sup>169</sup> *Southeastern Promotions, Ltd. v. Conrad*, 420 U.S. 546, 546 (1975).

<sup>170</sup> *Rosenberger v. Rector and Visitors of Univ. of Va.*, 515 U.S. 819, 819 (1995).

<sup>171</sup> In *Perry*, union members challenged a provision of a collective bargaining agreement that granted one bargaining representative exclusive access to the schools' teacher mailbox and interschool mail system, to the exclusion of a rival union. *Perry*, 460 U.S. at 46.

<sup>172</sup> Lidsky, *supra* note 134, at 1984-86. See *Perry*, 460 U.S. at 37; *Legal Serv. Corp. v. Velazquez*, 531 U.S. 533, 543 (2001).

<sup>173</sup> *Good News Club v. Milford Central School*, 533 U.S. 98, 108 (2001) (quoting *Cornelius v. NAACP Legal Def. Fund*, 473 U.S. 788, 806 (1985)); *Pleasant Grove City, Utah v. Summum*, 555 U.S. 460, 470 (2009).

<sup>174</sup> Lidsky, *supra* note 134, at 1987.

<sup>175</sup> *Id.* at 1989 (quoting *Ark. Educ. Television Comm'n v. Forbes*, 523 U.S. 666, 677 (1998) ("If the government excludes a speaker who falls within a class to which a designated public forum is made generally available, its action is subject to strict scrutiny.")).



depends on the particular conditions it has placed on its property at the outset.

#### 4. *Non-public Forum or Non-forum*

Finally, some types of public property can be deemed non-public or “not a forum at all.”<sup>176</sup> Such property would be a “space reserved by the government where no individual free speech is to take place.”<sup>177</sup> Access to a non-public forum can be restricted, as long as the restrictions are “reasonable and [are] not an effort to suppress expression merely because public officials oppose the speaker’s view.”<sup>178</sup> The Court explained that the restriction “need only be *reasonable*; and need not be the most reasonable or the only reasonable limitation.”<sup>179</sup> A determination that public property is non-public will effectively “result in deference to the discretion of the government actor,”<sup>180</sup> because in that forum, the state is treated no differently than a private property owner who has the right to “preserve the property under its control for the use to which it is lawfully dedicated.”<sup>181</sup> The constitutional doctrine that is applicable to a limited versus a non-public forum appears to be vastly the same; for both, viewpoint neutrality is required, and restrictions need only be reasonable.<sup>182</sup>

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<sup>176</sup> *Forbes*, 523 U.S. at 678.

<sup>177</sup> Randall P. Bezanson, *The Manner of Government Speech*, 87 DENV. U. L. REV. 809, 810 (2010).

<sup>178</sup> *Cornelius*, 473 U.S. at 800 (quoting *Perry Educ. Ass’n v. Perry Local Educators’ Ass’n*, 460 U.S. 37, 45 (1983)) (internal quotation marks omitted).

<sup>179</sup> *United States v. Kokinda*, 497 U.S. 720, 730 (1990) (quoting *Cornelius*, 473 U.S. at 808) (emphasis in original) (internal quotation marks omitted).

<sup>180</sup> Lidsky, *supra* note 134, at 1979.

<sup>181</sup> *United States v. Grace*, 461 U.S. 171, 178 (1983) (citing *Adderley v. Florida*, 385 U.S. 39, 47 (1966)) (internal quotation marks omitted).

<sup>182</sup> Lidsky, *supra* note 134, at 1989-90.

### 5. *Government Intent at Creation of Forum*

The Court's distinctions between these four categories rely exclusively on the government's intent during the establishment of the forum,<sup>183</sup> thereby creating a presumption against a finding of public forum status, unless the intent to create one is "demonstrably clear."<sup>184</sup> Thus, the public forum doctrine boils down to the reality that it is "the government [that] retains the choice of whether to designate its property as a forum for [a] specified class[] of speakers,"<sup>185</sup> aside from the strictly contained traditional public forum.

#### D. *Content and Viewpoint Neutrality*

The public forum doctrine also has strict requirements for content and viewpoint neutrality. For traditional and designated open public forums, government restrictions on speech are required to be content-neutral, while limited forums are by definition restricted on the basis of content.<sup>186</sup> Regardless of forum, however, viewpoint-based regulation is entirely prohibited; thus, a municipal theatre—a limited forum that regulates based on content because it allows only theatrical performances—cannot distinguish between plays that espouse one political viewpoint over another.

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<sup>183</sup> Justice Kennedy most aptly wrote of the public forum doctrine, "The First Amendment is a limitation on government, not a grant of power. Its design is to prevent the government from controlling speech. Yet under the Court's view the authority of the government to control speech on its property is paramount, for in almost all cases the critical step in the Court's analysis is a classification of the property that turns on the government's own definition or decision, unconstrained by an independent duty to respect the speech its citizens can voice there." *ISKCON*, 505 U.S. 672, 695 (1992) (Kennedy, J., concurring).

<sup>184</sup> *Cornelius v. NAACP Legal Def. Fund*, 473 U.S. 788, 803 (1985) (The Court refuses to infer government intent to create a public forum if the "nature of the property is inconsistent with expressive activity."); Lidsky, *supra* note 134, at 1998 (quoting *Hazelwood Sch. Dist. v. Kulmeier*, 484 U.S. 260, 270 (1988)).

<sup>185</sup> The Court further encouraged the government, "if faced with an all-or-nothing choice . . . [it should] open its property to some expressive activity," instead of not opening the property at all. *Ark. Educ. Television Comm'n v. Forbes*, 523 U.S. 666, 680 (1998).

<sup>186</sup> *Renton v. Playtime Theatres, Inc.*, 475 U.S. 41, 48 (1986). See *Police Dept. of City of Chi. v. Mosley*, 408 U.S. 92, 95-96 (1972) ("[A]bove all else, the First Amendment means that government has no power to restrict expression because of its message, its ideas, its subject matter or its content. . . . Once a forum is opened up to assembly or speaking by some groups, government may not prohibit others from assembling or speaking on the basis of what they intend to say.").

Content-neutral regulations are those that “are *justified* without reference to the content of the regulated speech.”<sup>187</sup> In other words, as best stated in *Ward*, “the principal inquiry in determining content neutrality . . . is whether the government has adopted a regulation of speech because of disagreement with the message it conveys.”<sup>188</sup> In *Ward*, for example, requiring performers to use New York City’s sound equipment and technicians during performances in Central Park was found to be a content-neutral regulation because the principal justification was to control noise levels.<sup>189</sup>

Such regulations need only satisfy intermediate scrutiny in that it must be narrowly tailored to serve a *significant* government interest.<sup>190</sup> The narrow tailoring requirement has generally not been as “narrow” as one might expect:<sup>191</sup> the “regulation need not be the least speech-restrictive means of advancing the government’s interests,” as long as that interest “would be achieved less effectively *absent* the regulation.”<sup>192</sup> Thus, the regulation need only be effective to

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<sup>187</sup> *Boos v. Barry*, 485 U.S. 312, 320 (1988) (citing *Va. Pharmacy Bd. v. Va. Citizens Consumer Council, Inc.*, 425 U.S. 748, 771 (1976)) (internal quotation marks omitted).

<sup>188</sup> *Ward v. Rock Against Racism*, 491 U.S. 781, 791 (1989).

<sup>189</sup> *Id.*

<sup>190</sup> *Id.* at 796 (citing *Clark v. Cmty. For Creative Non-Violence*, 468 U.S. 288, 293 (1984)) (internal quotation marks omitted). For intermediate scrutiny, the government need only point to a *significant* state interest to justify a content-neutral regulation, while a content-based regulation would require a valid *compelling* interest, and is presumptively invalid. *Boos*, 485 U.S. at 321.

<sup>191</sup> Justice Blackmun stated in dissent, “The Court’s past concern for the extent to which a regulation burdens speech than would a satisfactory alternative is noticeably absent from [the *Ward*] decision. The majority requires only that government show that its interest cannot be served as effectively without the challenged restriction. It will be enough, therefore, that the challenged regulation advances the government’s interest only in the slightest, for any differential burden on speech that results does not enter the calculus. Despite its protestations to the contrary, the majority thus has abandoned the requirement that restrictions on speech be narrowly tailored in ordinary sense of the phrase.” *Ward*, 491 U.S. at 806 (Blackmun, J., dissenting).

<sup>192</sup> *Turner Broad. Sys., Inc. v. Fed. Comm’n Comm’n*, 512 U.S. 622, 662 (1994) (quoting *Ward*, 491 U.S. at 799) (emphasis added). See also *United States v. O’Brien*, 391 U.S. 367, 377 (1968) (A content-neutral regulation will be sustained if “it furthers an important or substantial government interest; if the government interest is unrelated to the suppression of free expression; and if the incidental restriction on alleged First Amendment freedoms is no greater than is essential to the furtherance of that interest.”). A slightly different formulation of this rule was stated in *Frisby*: “A statute is narrowly tailored if it targets and eliminates no more than the exact source of the ‘evil’ it seeks to remedy.” *Frisby v. Schultz*, 487 U.S. 474, 485 (1988) (quoting *City Council of Los Angeles v. Taxpayers for Vincent*,

a discernible extent in serving a significant government interest, even if there are alternative regulations that would impact speech less.

Generally, if a regulation distinguishes on its face between “favored speech [and] disfavored speech on the basis of the ideas or views” being expressed, then it is content-based.<sup>193</sup> If a regulation “confer[s] benefits or impose[s] burdens *without* reference to ideas or views expressed, [then it is] in most instances content-neutral.”<sup>194</sup> In evaluating a constitutional challenge of such a restriction, the Court has considered whether the state has “adopted a regulation because of disagreement with the message it conveys,” making the government’s purpose the “controlling consideration.”<sup>195</sup> If a regulation serves purposes that are unrelated to the content of the expressive activity, even if it has an “incidental effect on some speakers or messages but not others,” the Court would deem it content-neutral.<sup>196</sup> The Court

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466 U.S. 789, 808-10 (1984)).

<sup>193</sup> *Turner*, 512 U.S. at 643.

<sup>194</sup> *Id.* Though Professor Erwin Chemerinsky points to *Renton* which makes the test of whether a law is content-based or content-neutral not on its terms, but rather its justification; thus, a law that is justified in content-neutral terms is deemed content-neutral, even if it is content-based on its face. The government can refute a facially content-based regulation by justifying it with content-neutral desire to avoid negative secondary effects. Chemerinsky, *supra* note 108, at 939.

<sup>195</sup> *Ward*, 491 U.S. at 791.

<sup>196</sup> *City of Renton, et al., v. Playtime Theatres, Inc.*, 475 U.S. 41, 47-48 (1986) (finding an ordinance that prohibits adult movie theatres within 1,000-feet of a residential zone is content-neutral because the state interest in suppressing crime is unrelated to the films being shown inside adult movie theatres, and because the ordinance was “aimed at . . . the *secondary effects*” of the theatres and “not with the content of adult films themselves.”). The secondary effects is an acceptable basis for regulation, because “[i]f the city had been concerned with restricting the message purveyed by adult theaters, it would have tried to close them or restrict their number rather than circumscribe their choice as to location.” *Id.* at 48 (quoting *Young v. American Mini Theatres*, 427 U.S. 50, 81 n.4 (1976)). See also *Hill v. Colorado*, 530 U.S. 703, 719-720, 735 (2000) (determining that a statute prohibiting any person within 100 feet of a health care facility’s entrance to “‘knowingly approach’ within eight feet of another [person without their consent] for the purpose of leafleting or displaying signs” is content-neutral despite its potentially discriminatory effects because the state’s interests in protecting access and privacy are unrelated to the speech being regulated. Justice Souter’s concurrence adds, “The key to determining whether [the regulation] makes a content-based distinction between varieties of speech lies in understanding that content-based discriminations are subject to strict scrutiny because they place the weight of government behind the disparagement or suppression of some messages, whether or not with the effect of approving or promoting others.”); *Leathers v. Medlock*, 499 U.S. 439, 453 (1991) (upholding the application of a general sales tax to cable television that was not applicable to print media, despite its discriminatory effects, because it did not suppress ideas and did not target a small group of speakers). The Court has

nevertheless warned that a “mere assertion of a content-neutral purpose” would be insufficient to save a regulation that “discriminates based on content.”<sup>197</sup> Constitutionally permissible “time, place, or manner” restrictions may not be based upon the content or subject matter of speech,<sup>198</sup> such as a prohibition on picketing that exempted picketers of labor disputes.<sup>199</sup> In narrow circumstances, the Court has determined that such content-based restrictions passed constitutional muster where it found that the specific subject of the speech would disrupt the facility’s operations while other subjects would not.<sup>200</sup>

Content-based regulations on speech must withstand strict scrutiny, and are presumptively invalid.<sup>201</sup> The government must show that the regulation “is necessary to serve a compelling state interest and that it is narrowly drawn to achieve that end.”<sup>202</sup> However, even in

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certainly contended with the downsides of this secondary effects aspect.

<sup>197</sup> *Turner*, 512 U.S. at 642-43. *But see* Marcy Strauss, *From Witness to Riches: the Constitutionality of Restricting Witness Speech*, 38 ARIZ. L. REV. 291, 317 (1996) (arguing that *Renton* “permits an end run around the First Amendment: the government can always point to some neutral, non-speech justification for its actions.”).

<sup>198</sup> *Consol. Edison Co. of N.Y., Inc. v. Pub. Serv. Comm’n of N.Y.*, 447 U.S. 530, 536 (1980).

<sup>199</sup> *Carey v. Brown*, 447 U.S. 455, 460 (1980); *Police Dept. of City of Chi. v. Mosley*, 408 U.S. 92, 95 (1972) (“The central problem with Chicago’s ordinance is that it describes permissible picketing in terms of its subject matter. . . . The operative distinction is the message on a picket sign.”).

<sup>200</sup> *Mosley*, 408 U.S. at 99 (An ordinance prohibiting all picketing within 150 feet of a school, with an exception of “peaceful picketing of any school involved in a labor dispute,” is found to be an unconstitutional extension of reasonable time, place, and manner restrictions, despite the state’s interest in preventing disruption to schools); *Consol. Edison*, 447 U.S. at 539 (referring to *Greer v. Spock*, 424 U.S. 828 (1976) and *Lehman v. Shaker Heights*, 418 U.S. 298 (1974), finding that “partisan political speech would disrupt the operation of governmental facilities even though other forms of speech posed no such danger.”).

<sup>201</sup> *United States v. Playboy Entm’t Group, Inc.*, 529 U.S. 803, 813 (2000) (citing to *Sable Comm’n v. Fed. Commc’ns Comm’n*, 492 U.S. 115, 126 (1989)); *R.A.V. v. City of St. Paul*, 505 U.S. 377, 382 (1992); *Renton v. Playtime Theatres, Inc.*, 475 U.S. 41, 46-47 (1986).

<sup>202</sup> *Boos v. Barry*, 485 U.S. 312, 321 (1988); *Sable Comm’n*, 492 U.S. at 126 (requiring that the government use the “least restrictive means to further the articulated interest,” and finding that the “protect[ion] the physical and psychological well-being of minors” is a valid compelling interest to satisfy strict scrutiny); *Playboy Entm’t*, 529 U.S. at 813 (“If a less restrictive alternative would serve the Government’s purpose, the legislature must use that alternative.”).

situations where the government makes content-based regulations, those regulations must still be viewpoint-neutral.<sup>203</sup>

### E. *Ample Alternative Channels of Communication*

The final piece of the public forum doctrine is the constitutional requirement that the regulation “leave open ample alternative channels of communication.”<sup>204</sup> In most cases, the Court’s inquiry has been limited to whether or not alternative channels exist *at all* for the speaker, and they are seemingly unconcerned whether those channels are truly “ample,” even if the regulation has significantly restricted the reach of the speaker.<sup>205</sup> For example, in *Renton*, where an ordinance restricted adult theatres from being within 1,000 feet of any residential zone, the Court rejected the lower court’s concern that there were insufficient alternative channels for speech merely because the speakers “must fend for themselves in the real estate market.”<sup>206</sup> In *Cornelius*, where the NAACP sought to be on a list of charities asking for contributions by federal employees, the Court thought

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<sup>203</sup> Bd. of Regents of Univ. of Wis. Sys. v. Southworth, 529 U.S. 217, 233-34 (2000) (referring to *Rosenberger v. Rector and Visitors of Univ. of Va.*, 515 U.S. 819 (1995)).

<sup>204</sup> *Perry Educ. Assoc. v. Perry Local Educators’ Assoc.*, 460 U.S. 37, 45 (1983).

<sup>205</sup> See *Ward v. Rock Against Racism*, 491 U.S. 781, 802 (1989) (finding that the regulation “continues to permit expressive activity,” and the fact that it “may reduce to some degree the potential audience for respondent’s speech is of no consequence, for there has been no showing that the remaining avenues of communication are inadequate.”); *United States v. Kokinda*, 497 U.S. 720, 738-39 (1990) (discussing that the regulation “goes no further than to prohibit personal solicitations on postal property,” and still allows political speech of other forms) (Kennedy, J. concurring). In *Hill*, Justice Kennedy’s dissent argues that the ordinance does not leave open ample alternative channels for communication, pointing out that “door-to-door distributions or mass mailing or telephone campaigns are not effective alternative avenues of communication for petitioners. . . . The statute strips petitioners of using speech in the time, place, and manner most vital to the protected expression.” *Hill v. Colorado*, 530 U.S. 703, 780 (2000) (Kennedy, J. dissenting). He added, “In a fleeting existence we have but little time to find truth through discourse. No better illustration of the immediacy of speech, of the urgency of persuasion, of the preciousness of time, is presented than in this case. Here the citizens who claim First Amendment protection seek it for speech which, if it is to be effective, must take place at the very time and place a grievous moral wrong, in their view, is about to occur. The Court tears away from the protesters the guarantees of the First Amendment when they most need it.” *Id.* at 792.

<sup>206</sup> *Renton*, 475 U.S. at 54 (“In our view, the First Amendment requires only that Renton refrain from effectively denying respondents a reasonable opportunity to open and operate an adult theater within the city.”).

direct mail and in-person solicitation were sufficient alternatives to the list.<sup>207</sup> The standard is thus satisfied if the Court finds that the regulation continues to permit expressive activity through other “avenues of communication.”<sup>208</sup>

#### F. *Prior Restraint*

The First Amendment also prohibits prior restraint, which the Court has described to be an “administrative [or] judicial order forbidding certain communications when issued in advance of the time that such communication are to occur.”<sup>209</sup> Prior restraint bears a “heavy presumption against its constitutional validity” in court.<sup>210</sup> In its “simple, most blatant form, a prior restraint is a law which requires submission of speech to an official who may grant or deny permission to utter or publish it based upon its contents.”<sup>211</sup> The Court is most concerned when speech has been suppressed “before an adequate determination [has been made] that it is unprotected by the First Amendment.”<sup>212</sup> In *Southeastern Promotions v. Conrad*,<sup>213</sup> prior restraint was found when the Court determined that public officials had “the power to deny use of a [public] forum in advance of actual expression,” and such power was “not bounded by precise and clear standards.”<sup>214</sup>

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<sup>207</sup> *Cornelius v. NAACP Legal Def. Fund*, 473 U.S. 788, 809 (1985).

<sup>208</sup> *Ward*, 491 U.S. at 802.

<sup>209</sup> *Alexander v. United States*, 509 U.S. 544, 550 (1993) (quoting *Melville Nimmer, NIMMER ON FREEDOM OF SPEECH* 4-14 (1984)); Chemerinsky, *supra* note 108, at 950.

<sup>210</sup> *Neb. Press Ass’n v. Stuart*, 427 U.S. 539, 559 (1976) (stating that “prior restraints on speech and publication are the most serious and least tolerable infringement” on First Amendment rights).

<sup>211</sup> *Alexander*, 509 U.S. at 566 (Kennedy, J., dissenting).

<sup>212</sup> *Pittsburgh Press Co. v. Pittsburgh Comm’n on Human Relations*, 413 U.S. 376, 390 (1973); Martin H. Redish, *The Proper Role of the Prior Restraint Doctrine in First Amendment Theory*, 70 VA. L. REV. 53, 57 (1984) (“[P]rior restraints are especially disfavored because they authorize abridgment of expression prior to a full and fair determination of the constitutionally protected nature of the expression by an independent judicial forum”).

<sup>213</sup> *Southeastern Promotions, Ltd. v. Conrad*, 420 U.S. 546, 553 (1975).

<sup>214</sup> *Id.*

In the case at hand, although BART's actions appear to constitute prior restraint because they have suppressed speech before the speech has occurred, BART was not empowered by any legal means to shut down cell phone service, and any semblance of procedure they did have for such an action was not closely followed.<sup>215</sup> Courts will engage in prior restraint analysis in situations where an administrative or judicial order, such as an injunction, has been challenged on First Amendment grounds. Thus, although BART exercised its *technical* capability to suppress speech, prior restraint does not apply because it lacked the proper *legal* vehicle to do it. Ultimately, the circumstances surrounding the August 11 cell service shutdown best lend themselves to a dissection of the public forum doctrine because BART's actions did not forbid speech as an injunction would, and the Court has historically treated similar circumstances as a question of forum type rather than whether it was a prior restraint.<sup>216</sup>

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<sup>215</sup> The decision to shut down cell service did not make it through the proper channels because it "wasn't brought to [the Board of Directors] for discussion [even though they were] the policymakers." See *Proper Channels*, *supra* note 90. The tactic "was presented [to the directors] as a 'fait accompli.'" *Id.* It is unclear whether legal counsel was officially sought prior to the shutdown. BART spokesman "Johnson said that [BART's lawyer Sherwood] Wakeman had consulted the Supreme Court case *Brandenburg v. Ohio*, which lays out circumstances when 'inflammatory speech' can be squelched, before allowing the wireless shutdown to go forward." *Spur of the Moment*, *supra* note 65. When asked about the incident in a press conference later: "Well, um, the discussion took place with counsel in the room," Wakeman stammered. "This is an issue which, from my own experience, when there is an imminent danger or threat of violation of law, there is legal authority, um, to curtail free speech." *Id.*

Wakeman's analysis was insufficient to protect BART from constitutional challenge. The *Brandenburg* standard is that "the state [may not] forbid or proscribe advocacy of the use of force or of law violation except where such advocacy is directed to inciting or producing imminent lawless action and is likely to incite or produce such action." *Brandenburg v. Ohio*, 395 U.S. 444, 447 (1969). The standard for unprotected speech was not that it had to be "inflammatory speech" as Wakeman had suggested, but rather that it must incite "imminent lawless action." It is unlikely the protesters' blog post, see *supra* note 63, would constitute unprotected speech under this standard, as it did not advocate for *imminent* lawless action, merely a gathering on the train platform a few days later, and was moreover not the target of BART's speech restriction. Since the speech that would have likely caused "imminent" action was preemptively suppressed by the shutdown, there is no speech to analyze to determine whether it would have constituted "incite[ment of] . . . imminent lawless action" under *Brandenburg*. See W. Danny Green, Comment, *The First Amendment and Cell Phones: Governmental Control Over Cell Phone Use on Publicly Owned Lands*, 44 ARIZ. ST. L. J. 1355, 1382 (2012); Brandon Wiebe, Comment, *BART's Unconstitutional Speech Restriction: Adapting Free Speech Principles to Absolute Wireless Censorship*, 47 U.S.F. L. REV. 195, 210-212 (2012).

<sup>216</sup> See discussion of *ISKCON*, 505 U.S. 672 (1992) (holding that a prohibition against leafleting in an airport was constitutional because the airport was not a traditional public



#### IV. CONSTITUTIONALITY OF THE BART CELL PHONE SERVICE SHUTDOWN

The public forum doctrine, despite coming under severe criticism from both scholars and lower courts in the last few decades, has continued to be used by the Court to analyze challenges to government restrictions on speech. The BART cell service shutdown on August 11 not only serves as an additional example of the doctrine's increasingly stark problems in applicability but moreover highlights a new quandary that has developed as a result of the interconnectivity in communication through the Internet. This Article argues that the cell service shutdown has pinpointed the core of the problem with the public forum doctrine: the very lines drawn between categories of forums are obstacles to effective First Amendment analysis because society now engages in free speech in "places" that cannot be clearly isolated or distinguished.<sup>217</sup> On August 11, 2011, what "place" would the anticipated speech have occurred, had it not been thwarted: on the physical train platform, or through Internet access, or both?<sup>218</sup> As set forth below, the court would struggle<sup>219</sup> to fit the cell service shutdown into the public forum doctrine starting with the very first step: identifying the appropriate forum.

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forum), *infra* Part IV.B.1.

<sup>217</sup> Even the definition of what constitutes a forum can be problematic. One scholar wrote that the "unspoken definition of a forum seems to be 'a platform for expression by persons other than the owner of the platform.' However . . . it becomes clear that many places—most places, in fact—are not forums. The mere fact that someone might conceivably use a location for expression does not make it a forum in this sense." Caplan, *supra* note 135, at 655. He offers the example of "carv[ing his] initials into the walls of the Grand Canyon" or "picket[ing] in the hallways of the Pentagon"; merely because expressive activity is occurring does not make the place a viable forum. *Id.* at 655.

<sup>218</sup> See discussion of what constitutes the "forum," Wiebe, *supra* note 215, at 211-12.

<sup>219</sup> Courts would likely struggle, just as constitutional scholars have. One scholar was "not sure if [BART has violated] the First Amendment. Marvin Ammori, *Silencing Phones, Stifling Protests, Violating Freedom of Speech?*, AMMORI.ORG (Aug. 12, 2011), <http://ammori.org/2011/08/12/bart-sf-silencing-mobile-phones-stifling-political-protests-violating-first-amendment>. Another scholar thought BART's actions were "likely constitutional." Eugene Volokh, *An Unusual (But Likely Constitutional) Speech Restriction*, THE VOLOKH CONSPIRACY (Aug. 13, 2011, 11:22 AM), <http://www.volokh.com/2011/08/13/an-unusual-but-likely-constitutional-speech-restriction>. Scholar Ammori commented on the disagreement: "Both of us are less than certain (using terms like 'likely'), partly because First Amendment jurisprudence has so much ambiguity in it." Marvin Ammori, *BART SF 4: More on First Amendment Analysis*, AMMORI.ORG (Aug. 13, 2011), <http://ammori.org/2011/08/13/bart-sf-4-more-first-amendment>.

### A. *Identifying the Forum*

The August 11 incident, along with other recent world events, signals the growing trend of using the Internet to augment traditional forms of speech and protest. In particular, social media's ability to conveniently and effectively network the world's population means that individuals are gaining "more opportunities to engage in public speech" to the point where such online tools have become the norm for those who want to "undertake collective action."<sup>220</sup> Although the utilization of emerging technologies to organize speakers is not a new phenomenon,<sup>221</sup> the true impact of those technologies on the effectiveness and reach of their speech has never been more apparent or significant.<sup>222</sup> Instead of what used to primarily be a two-way conversation between protesters and the entity against which they were protesting, present-day protests have been transformed by social media in several significant respects. Though news coverage of such protesters by traditional media did spur conversation among pockets of non-participants, today social media has opened a common conversation that is accessible by all.<sup>223</sup> This lessens the traditional media's overall influence on speech and removes an intermediary that by its nature had to filter the content of the medium it provided.

Because it is not constrained by limited resources as traditional media was, Internet-based social media is able to serve two purposes

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<sup>220</sup> Clay Shirky, *The Political Power of Social Media: Technology, the Public Sphere, and Political Change*, 90 FOREIGN AFF. 28 (Feb. 2011). See generally Stacey D. Schesser, Comment, *A New Domain for Public Speech: Opening Public Spaces Online*, 94 CALIF. L. REV. 1791 (2006).

<sup>221</sup> Shirky, *supra* note 220 (commenting that a text message as simple as "Go 2 edsa. Wear blk" brought millions of Filipinos to converge on a major intersection in Manila to protest against a corrupt politician in 2001. This analysis remains highly relevant even though this piece was written prior to the Arab Spring).

<sup>222</sup> Amy Gahran, *Mobile Tools for Protest—Then and Now*, CNN.COM (Oct. 10, 2011), <http://edition.cnn.com/2011/10/10/tech/mobile/mobile-tools-for-protest> (comparing the difference between 2004, where text messaging was the primary mobile tool for protest coordination, and 2011 for the Occupy Wall Street protests, which were organized on Twitter and Facebook, and finding that even "apolitical" individuals would know about Occupy Wall Street because it had become a "social phenomenon."). See also Ezra Klein, *The Revolution Will Be Tweeted*, WASHINGTONPOST.COM (May 2, 2011, 11:39 A.M.), [http://www.washingtonpost.com/blogs/ezra-klein/post/the-revolution-will-be-tweeted/2011/04/13/AFIoIzF\\_blog.html](http://www.washingtonpost.com/blogs/ezra-klein/post/the-revolution-will-be-tweeted/2011/04/13/AFIoIzF_blog.html).

<sup>223</sup> Gahran, *supra* note 222.

efficiently: it is both a tool to organize speech,<sup>224</sup> as well as a platform for speech itself,<sup>225</sup> akin to being able to leaflet everyone at once. In other words, the once easily separable acts of “creating” speech<sup>226</sup> and “receiving” speech<sup>227</sup> have become combined into one amorphous action thanks to the Internet. Its capacity to significantly expand the scope of protests makes it an easy target for government regulation intended to restrict the resulting speech conducted in traditional physical locations, and thus, its dual-purpose nature as both a tool and a platform has profound implications for protesters’ First Amendment rights.

BART’s shutdown of cell phone service therefore poses the essential constitutional questions that courts will surely face in the future when weighing the protections afforded to speakers against the government’s interests in regulating them. The current First Amendment framework of the public forum doctrine evolved from, and still retains attributes of, the most basic concept that a public sidewalk is a physical forum where speakers’ rights are at their height. With the emergence of telephone, radio, and other metaphysical forums for speech, the doctrine has gradually expanded beyond its core emphasis on physical boundaries,<sup>228</sup> but such forums still possess a common characteristic of limited capacity and this characteristic continues to play a prominent role in Supreme Court decisions. The Internet, while not infinite, can afford to accommodate near-limitless speech with comparably far fewer costs than that of any public forums

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<sup>224</sup> See *Reno v. ACLU*, 521 U.S. 844, 850-51 (1997) (“Taken together, these tools [referring to the Internet’s e-mail, automatic mailing list services, newsgroups, chatrooms and World Wide Web] constitute a unique medium . . . located in no particular geographic location but available to anyone, anywhere in the world, with access to the Internet. . . . There are thousands of such [news] groups, each serving to foster an exchange of information or opinion on a particular topic . . .”).

<sup>225</sup> *Id.* at 853 (“[The Web] constitutes a vast platform from which to address and hear from a worldwide audience of millions of readers, viewers, researchers, and buyers.”).

<sup>226</sup> *E.g.*, handing out leaflets, protesting at a rally, writing an op-ed piece, burning a flag.

<sup>227</sup> *E.g.*, accepting the leaflets, watching the rally, reading the op-ed piece, observing the flag burning. The First Amendment protects a right to access information as well. See *Stanley v. Georgia*, 394 U.S. 557, 564 (1969) (“It is now well established that the Constitution protects the right to receive information and ideas.”); *Griswold v. Connecticut*, 381 U.S. 479, 482 (1965) (“The right of freedom of speech and press includes not only the right to utter or to print, but the right to distribute, the right to receive, [and] the right to read.”).

<sup>228</sup> See *Barbas*, *supra* note 30, at 810.

in existence today.<sup>229</sup> This is the critical difference, as the BART shutdown demonstrates, between public forums of yesterday and the Internet, making the public forum doctrine increasingly more difficult to apply to reality and possibly obsolete.<sup>230</sup>

The BART cell service shutdown stifled both the speech that was to occur through Internet access as well as on the train platform. To define the forum, the Court has generally “focused on the access sought by the speaker.”<sup>231</sup> Here, by way of the Internet, the protesters sought access to the train platform but were denied both the Internet access and access to the platform. The planning, as well as some actual speech, had taken place over the Internet and was stifled. The physical protest was coordinated to take place on the train platforms. This exercise in conceptual gymnastics to apply the public forum doctrine demonstrates the doctrine’s failings. Thus, in order to shoehorn the BART incident into the public forum doctrine, the court must counter-intuitively separate what has been conventionally considered one unit of speech: the *planning* of the protest (over the Internet) and the actual physical protest (on the train platform).<sup>232</sup>

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<sup>229</sup> But, the Internet is generally not a “public forum” because they are overwhelmingly privately owned, and the private owners have Terms of Service agreements restricting free speech that would otherwise be constitutionally protected in a public forum. *See* discussion of private regulation of speech, Nunziato, *supra* note 32, at 1116.

<sup>230</sup> *See* John J. Brogan, *Speak & Space: How the Internet is Going to Kill the First Amendment as We Know It*, 8 VA. J.L. & TECH. 8, ¶ 74 (2003) (“Conventional wisdom suggests that the best way to protect the Internet as a forum for free speech is to find ways to make it like the fora that receive special protection in the physical world. . . . This strategy, as applied to the Internet, however, would be exactly backward, and would produce negative consequences.”).

<sup>231</sup> *Cornelius v. NAACP Legal Def. Fund*, 473 U.S. 788, 801(1985). One scholar did a study of 26 appellate court decisions to identify the factors that courts have considered when deciding if a public space is a traditional public forum. Friedman, *supra* note 134, at 930, 944. He looked at seven factors: (1) whether the forum was perceived as a street, park, or sidewalk, (2) whether it has broad public access, (3) whether it is a public thoroughfare, (4) indistinguishable from the surrounding public area, (5) its general purpose versus particular purpose, (6) historic use for public discourse, and (7) proximity to a seat of legislative or executive power. *Id.* at 946-57.

<sup>232</sup> BART’s subsequent approval of a separate Cell Service Interruption Policy supports this Article’s method of separating the two forums of the train platform from Internet access. Recent analysis has concluded that the forum in question ought to be Internet access, not the train platforms. *See, e.g.*, Jacob G. Fleming, Note, *The Case for a Modern Public Forum: How the Bay Area Rapid Transit System’s Wireless Shutdown Strangled Free Speech Rights*, 51 WASHBURN L.J. 631, 653 (2012).

## B. *The Train Platform as a Forum for Speech*

The first step of conventional public forum analysis focuses on the location of the protest. Once the location's boundaries have been identified, the Court then determines the government's purpose for providing the location, and labels it one of the four types of forums for speech. The final step of the Court's constitutional analysis is to determine whether the government has satisfied the forum's requirements.

### 1. *The Platform is Not a Public Forum*

The organizers specifically requested protesters to assemble on the train platform in Civic Center Station, and BART police assumed the protest would also occur on the train platform, as it did during previous protests. Because of BART's clear policy on expressive activity within its physical property,<sup>233</sup> the Court would likely find that train platforms are non-public forums, or alternately, limited forums for speech. Thus, such restrictions on speech would only need to be reasonable and viewpoint-neutral to pass constitutional muster.

The Court's analysis in *International Society for Krishna Consciousness, Inc. v. Lee*<sup>234</sup> (*ISKCON*) is especially illustrative in assessing BART's cell phone service shutdown. In *ISKCON*, a non-profit religious organization challenged the government's regulation forbidding the "repetitive solicitation of money or distribution of literature" within airport terminals.<sup>235</sup> The regulation governed only the terminals and permitted such solicitation and distribution on the sidewalks outside the terminal buildings.<sup>236</sup>

Although the Court acknowledged that the solicitation at issue was "uncontested" as protected speech,<sup>237</sup> it swiftly concluded that airport terminals were not traditional public forums, because airports have

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<sup>233</sup> Expressive Activities Policy, *supra* note 51.

<sup>234</sup> *ISKCON*, 505 U.S. 672 (1992).

<sup>235</sup> *Id.* at 675.

<sup>236</sup> *Id.* at 675-76.

<sup>237</sup> The Court came to a 6 to 3 decision, and Justice O'Connor and Justice Kennedy filed concurring opinions that elaborated on the application of the public forum doctrine. *Id.* at 673.

“only recently achieved their contemporary size and character,” and they have not “historically been made available for speech activity.”<sup>238</sup> *ISKCON* had pointed to the variety of speech activity occurring at “transportation nodes,” but the Court declined to extend its conclusion to find that all transportation nodes could not be traditional public forums.<sup>239</sup> Chief Justice Rehnquist, writing for the majority, stated that the airports’ primary purpose as one dedicated to “efficient air travel,” not to “the free exchange of ideas,” and did not find the government intended to create a designated or limited public forum within the airport terminals.<sup>240</sup> Concluding that the airport terminal was a non-public forum, the Court held the regulation to be reasonable and therefore constitutional because allowing such solicitation would significantly obstruct airport activities and because the petitioners were still permitted to solicit outside on the airport sidewalk.<sup>241</sup>

Even though the Court did not extend its analysis to all transportation hubs such as train stations, *ISKCON* nevertheless supports the conclusion that the BART train platform is not a public forum. *ISKCON* reaffirmed the high threshold required to categorize a government-owned facility as a traditional public forum and, even though train stations have been in existence for longer than airports, implied that the Court would not likely find that train stations are

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<sup>238</sup> Although the distribution of literature at airports has recently become more commonplace, the Court nevertheless found that the “tradition of airport activity” has not been for expressive activity and thus foreclosed on the possibility that airports are traditional public forums. *Id.* at 680-81.

<sup>239</sup> *Id.* at 681-82. For a discussion of the First Amendment concerns of transit facilities not including those stemming from providing Internet access, see TRANSPORTATION RESEARCH BOARD OF THE NATIONAL ACADEMIES, FIRST AMENDMENT IMPLICATIONS FOR TRANSIT FACILITIES: SPEECH, ADVERTISING, AND LOITERING (June 2009), available at [http://onlinepubs.trb.org/onlinepubs/tcrp/tcrp\\_lrd\\_29.pdf](http://onlinepubs.trb.org/onlinepubs/tcrp/tcrp_lrd_29.pdf).

<sup>240</sup> *ISKCON*, 505 U.S. at 681-83.

<sup>241</sup> *Id.* at 683-85. Justice O’Connor’s concurrence stated that the regulation banning leafleting is not reasonable because leafleting poses fewer difficulties for the airport to accomplish its purpose than face-to-face solicitation does. She found that the airport’s absolute prohibition lacked an independent justification aside from the concerns raised by leafleting, and emphasized that the Court requires “some explanation as to why certain speech is inconsistent with the intended use of the forum.” *Id.* at 690-92 (O’Connor, J., concurring) (citing *United States v. Kokinda*, 497 U.S. 720, 734 (1990)). BART’s independent justification includes safety and overcrowding concerns, insofar as it has proven to prevent the transit system from operating.

“immemorially . . . time out of mind’ held in the public trust, and used for purposes of expressive activity.”<sup>242</sup>

Prior to *ISKCON*, the U.S. Court of Appeals for the Second Circuit ruled on *Young v. New York City Transit Authority*, a case that challenged a transit authority regulation that prohibited begging and panhandling in the subway system on First Amendment grounds.<sup>243</sup> The court found that begging and panhandling was not a type of protected speech, but then went further and applied the public forum doctrine,<sup>244</sup> concluding that the platforms were not a traditional public forum.<sup>245</sup> The court reasoned that, although the regulation permitted solicitation by approved organizations, the subway platform was at best a limited forum “for use by certain speakers,” as intentionally created by the transit authority.<sup>246</sup> The regulation was constitutionally sound because the transit authority “never intended to designate sections of the subway system . . . as a place for begging and panhandling.”<sup>247</sup> Several facts of the *Young* case closely parallel those of BART, in particular its pre-established restrictions on expressive activity within the stations and on the platforms. BART, in its pre-existing policy and in its post-incident press releases, reiterated that “assemblies or demonstrations or . . . other expressive activities”<sup>248</sup> were not permitted in the paid areas of BART stations, which included the platforms and train cars. As the court found in *Young*, such restrictions on speech within the station would lead a court to conclude that BART intended to create a limited or non-public forum,

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<sup>242</sup> *Id.* 505 U.S. at 679.

<sup>243</sup> *Young v. N.Y.C. Transit Auth.*, 903 F.2d 146 (2d Cir. 1990).

<sup>244</sup> The Second Circuit cites both *Cornelius v. NAACP Legal Def. Fund*, 473 U.S. 788, 802 (1985), and *Perry Educ. Ass’n v. Perry Local Educators’ Ass’n*, 460 U.S. 37, 46 n.7 (1983), in its formulation of the public forum doctrine. *Young*, 903 F.2d at 161-62.

<sup>245</sup> An organization representing homeless people brought a class action challenging a transit authority regulation that prohibits begging and panhandling in the New York City subway system. The regulation allowed for certain non-commercial activities in specific such as “public speaking; distribution of written materials; solicitation for charitable, religious or political causes; and artistic performances, including the acceptance of donations,” but not on the subway platform, and certain other areas that would interfere with movement within the station. *Id.* at 148 (internal quotation marks omitted).

<sup>246</sup> *Id.* at 161 (citing *Cornelius*, 473 U.S. at 802).

<sup>247</sup> *Id.* at 162.

<sup>248</sup> Temporary Wireless Service Interruption, *supra* note 73.

which forecloses protests from occurring directly on the train platform. Furthermore, in *Cornelius*, Justice O'Connor, writing for the majority, stated that, "[i]n cases where the principal function of the property would be disrupted by expressive activity, the Court is particularly reluctant to hold that the government intended to designate a public forum."<sup>249</sup> The BART platform is a limited or non-public forum because it is designed to allow riders on and off trains as efficiently and safely as possible, and expressive activity would likely disrupt that function, as it clearly did during the July 11 protests. Therefore, any speech restrictions need only be reasonable and viewpoint-neutral to be constitutional because the train platform is a limited public forum.

## *2. Restrictions on Speech Are Reasonable and Viewpoint-Neutral*

The Court would likely find it reasonable for BART to prohibit expressive activity on the train platform for the same reasons it found that airport terminals were not constitutionally obligated to allow expressive activity. The Civic Center Station is one of the system's busiest; it serves four of the system's five train lines,<sup>250</sup> and sees the fourth-highest number of daily riders out of 44 stations, with over 18,000 exits per day.<sup>251</sup> BART's restrictions on speech occurring on the platform were reasonable, in light of the severe impact on transportation and the safety concerns of the July 11 protest in which protesters climbed on top of trains and delayed the entire system for three hours.<sup>252</sup> BART's Expressive Activities Policy<sup>253</sup> also permits demonstrations to occur in other areas of the station, which favors a finding of reasonableness.

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<sup>249</sup> Oregon Dept. of Fish and Wildlife v. Klamath Indian Tribe, 473 U.S. 788, 804 (1985); Chemerinsky, *supra* note 108, at 1143 ("[T]he Court considers the extent to which speech is incompatible with the usual functioning of the place. The greater the incompatibility, the more likely that the Court will find the place to be a nonpublic forum.").

<sup>250</sup> BART STATION LIST, <http://www.bart.gov/stations>; CIVIC CENTER/UN PLAZA STATION, <http://www.bart.gov/stations/civic/index.aspx> (last visited Mar. 29, 2014) (The station is near several notable San Francisco destinations including City Hall, War Memorial Opera House, Asian Art Museum, Louise M. Davies Symphony Hall, and the Main Branch of the San Francisco Public Library. The station also connects to the San Francisco Muni trolley and bus lines.).

<sup>251</sup> BART FISCAL YEAR WEEKDAY AVERAGE EXITS, *supra* note 11.

<sup>252</sup> See *BART Protest Snarls Evening Commute*, *supra* note 9.

<sup>253</sup> Expressive Activities Policy, *supra* note 51.



BART's Expressive Activities Policy is facially viewpoint-neutral and by that measure, constitutional, although its August 11 *enforcement* of the policy may have stemmed from viewpoint-based intent, as perhaps best evinced by Johnson's staged pro-BART news conference in Powell Street Station.<sup>254</sup> Powell Street Station sees 24,000 daily exits and is one of the system's most trafficked,<sup>255</sup> which perhaps provided Johnson a larger audience than the protest would have had at Civic Center Station. However, the news conference occurred within the "free area" of the station,<sup>256</sup> where expressive activity is allowed with a license, as opposed to the train platform, where expressive activity is wholly prohibited. Four days after the August 11 incident, protesters gathered near the Civic Center Station and marched down Market Street toward Powell Station, just as San Francisco and BART police officers shut down both the Civic Center and Powell Stations, as well as several other stations that ran along Market Street, citing safety concerns.<sup>257</sup> Prior to 2011, BART regularly shut down various stations to address safety concerns arising from demonstrations unrelated to BART.<sup>258</sup> In this sense, by not physically shutting down the stations, BART did not react as strongly on August 11 as it did for other protests. Thus, in the context of its actions over the last several years, BART did not engage in viewpoint-based enforcement of its policy on expressive activity.

The train platform then, given the Expressive Activities Policy, was a limited forum that would enable BART to shut off cell phone service without violating the First Amendment. This conventional approach, however, neglects the "access sought by the speaker,"<sup>259</sup> which for the

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<sup>254</sup> Justin Berton, *BART Spokesman In Hot Water For Staging Support*, S.F. CHRON. (Sept. 14, 2011), <http://www.sfgate.com/bayarea/article/BART-spokesman-in-hot-water-for-staging-support-2309676.php>.

<sup>255</sup> *BART Average Weekday Exits by Station*, *supra* note 11.

<sup>256</sup> Berton, *supra* note 254.

<sup>257</sup> Damon Poeter, *Anonymous BART Protest Shuts Down Several Underground Stations*, PCMAG.COM (Aug. 15, 2011), <http://www.pcmag.com/article2/0,2817,2391160,00.asp>.

<sup>258</sup> *BART Stations Open After Protest Closures*, ABC NEWS (Oct. 31, 2008), [http://abclocal.go.com/kgo/story?section=news/local/east\\_bay&id=6482735](http://abclocal.go.com/kgo/story?section=news/local/east_bay&id=6482735); Rachel Gordon, *BART Criticized for Closing Three Stations*, S.F. CHRON. (Nov. 7, 2008), <http://www.sfgate.com/bayarea/article/BART-criticized-for-closing-3-stations-3186531.php> (The protests were over immigration raids).

<sup>259</sup> *Cornelius v. NAACP Legal Def. Fund*, 473 U.S. 788, 801 (1985).

August 11 protesters was Internet access while underground in BART stations and platforms. A court, applying the public forum doctrine to the Internet access provided by BART, would likely conclude that BART acted unconstitutionally that day.

### C. *The Internet*<sup>260</sup>

The Court's conventional analysis of the train platform as described above would, by most scholars' expectations, be the end of the story. By closing the book here, however, the Court would be denying the fact that today, the Internet has become the latest realization of the "marketplace of ideas" so critical to the democracy envisioned by the Founding Fathers. Moreover, the Court's jurisprudence on the First Amendment provides for analysis of forums that do not have the *physical* boundaries easily marked by sidewalks or doors or walls. The analysis of the Internet below builds upon this acknowledgement and proceeds to categorize the Internet into one of the four types of forums. While the Court is unlikely to label the Internet a "traditional" forum for speech, First Amendment precedence allows for the "designated open forum" label, which prohibits the government from placing restrictions on speech after creation of the forum.

#### 1. *The Emergence of the Metaphysical Forum*

The Court has had no trouble identifying metaphysical forums as potential public forums for First Amendment purposes, such as a charitable fundraising list,<sup>261</sup> or a student activities fund,<sup>262</sup> or an interschool mail system.<sup>263</sup> In *Rosenberger v. Rector*, a student-run

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<sup>260</sup> Cell phone service is an effective equivalent to Internet access for the purposes of this Article, as the service provided by BART allowed for phone calls, text messages, as well as full web access. The protesters generally communicated through both web access (via social media tools such as Twitter) and text messages. The BART Wi-Fi service was also shut down, but because it included a Terms of Service, it is unlikely amenable to First Amendment analysis. See Eve Batey, *BART Defends Decision to Cut Off Cell Service After Civil Rights, FCC Concerns Raised*, SFAPPEAL.COM (Aug. 12, 2011), <http://sfappeal.com/news/2011/08/bart-cell-fcc.php>.

<sup>261</sup> *Cornelius*, 473 U.S. at 804-05.

<sup>262</sup> *Bd. of Regents of Univ. of Wis. Sys. v. Southworth*, 529 U.S. 217, 230 (2000); *Rosenberger v. Rector and Visitors of Univ. of Va.*, 515 U.S. 819, 830 (1995).

<sup>263</sup> *Perry Educ. Ass'n v. Perry Local Educators' Ass'n*, 460 U.S. 37, 37 (1983). See Lidsky,

religious publication challenged their school's decision not to pay for the organization's printing costs through a "Student Activities Fund" because it was prohibited by the school's intentions to support a broad range of activities related to an educational purpose.<sup>264</sup> Though the forum was "more . . . metaphysical than . . . spatial or geographic," the Court nevertheless applied the public forum doctrine as it would have to a geographic "place."<sup>265</sup> The Court has also described the Internet as including "vast democratic forums,"<sup>266</sup> and compared the use of "internet distribution mechanisms to pamphleteering," while explicitly referring to public forum case law.<sup>267</sup>

The generation of Americans that has grown up in the age of Facebook and Twitter would balk at the mere suggestion that the Internet is not a public forum in which their speech is protected by the First Amendment.<sup>268</sup> The ACLU, in its letter to BART, compared the shutdown to the government opening a park and then closing the park doors to speakers it disagrees with.<sup>269</sup> As exemplified by the reasoning in *ISKCON*, however, the Court would most likely find that the Internet cannot qualify as a traditional public forum, wholly because

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*supra* note 134, at 1995.

<sup>264</sup> *Rosenberger*, 515 U.S. at 830.

<sup>265</sup> *Id.*

<sup>266</sup> Lidsky, *supra* note 134, at 1995 (quoting *Reno v. ACLU*, 521 U.S. 844, 868-70 (1997)). The Court has further presumed that restriction of the Internet would negatively impact freedom of speech. *Reno*, 521 U.S. at 885 ("The record demonstrates that the growth of the Internet has been and continues to be phenomenal. As a matter of constitutional tradition, in the absence of evidence to the contrary, we presume that governmental regulation of the content of speech is more likely to interfere with the free exchange of ideas than to encourage it. The interest in encouraging freedom of expression in a democratic society outweighs any theoretical but unproven benefit of censorship.").

<sup>267</sup> Lidsky, *supra* note 134, at 1995 (quoting *Reno*, 521 U.S. at 868-70). Professor Lidsky stated, "It is hardly a stretch to characterize an interactive social media site as a public forum, when it is designed explicitly for providing a locus of discussion and debate." *Id.*

<sup>268</sup> See *Opening Public Spaces Online*, *supra* note 220, at 1798-99; Cynthia Wong, *Welcome to San Francisco – Next Stop, Cairo?*, CENTER FOR DEMOCRACY & TECHNOLOGY (Aug. 23, 2011), <http://cdt.org/blogs/cynthia-wong/238welcome-san-francisco-next-stop-cairo>.

<sup>269</sup> Letter from Abdi Soltani, *supra* note 107. See also *Opening Public Spaces Online*, *supra* note 220, at 1799 ("In many ways, cyberspace has become the modern embodiment of our public streets and parks in providing the space for speech. . . . [A]ctivists seek out their base audience [by] organizing online campaigns.").

of how recently it had come into existence.<sup>270</sup> Moreover, it was not until the late 1990s that the Internet had developed enough technological capacity and participation to allow for the near-limitless speech that now deserves the Court's closer scrutiny for First Amendment protection.<sup>271</sup>

## 2. Designated for Expressive Activity

In *United States v. American Library Association (ALA)*,<sup>272</sup> the Court stated flatly, "Internet access in public libraries is neither a 'traditional' nor a 'designated' public forum."<sup>273</sup> Though the public forum doctrine undeniably forecloses on the possibility that the Internet can be a *traditional* forum, the question of whether it can be a designated one is more nuanced.

Generally, private corporations have provided Internet service, with no implication of state action.<sup>274</sup> However, this is set to change, as a growing number of U.S. municipalities are installing wireless, broadband, and cell phone access points.<sup>275</sup> The most significant

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<sup>270</sup> The Internet was invented in the 1960s, developed originally as a military-funded experiment. Barry M. Leiner, Vinton G. Cerf, et al., *Brief History of the Internet*, INTERNETSOCIETY.ORG, <http://www.internetsociety.org/internet/internet-51/history-internet/brief-history-internet> (last visited Mar. 29, 2014). See *Opening Public Spaces Online*, *supra* note 220, at 1809 ("[E]ven if new forums bear the same qualities as 'traditional' public spaces, the Court has refused to extend this high level of protection past the historic confines of the doctrine. . . . Even though the Internet fits into this 'traditional' definition and provides an effective space for those who could not otherwise be heard, the Court's strict interpretation indicates that it will most likely not extend traditional public forum status to such a new medium for communication.").

<sup>271</sup> Leiner, Cerf, et al., *supra* note 270.

<sup>272</sup> *United States v. Am. Library Ass'n, Inc.*, 539 U.S. 194 (2003) [hereinafter *ALA*].

<sup>273</sup> *Id.* at 205.

<sup>274</sup> In *ISKCON*, the Court stated that until recently, transportation hubs were typically privately owned, and therefore any evidence of expressive activity occurring in transportation hubs would be "irrelevant to public forums analysis." *ISKCON*, 505 U.S. 672, 681 (1992) (emphasis in original). See discussion of private actors regulating speech, Nunziato, *supra* note 32, at 1135-43; *Opening Public Spaces Online*, *supra* note 220, at 1799. While much of the scholarship surrounding Internet speech has been about developing First Amendment protections in a medium that is mostly privately owned, in the case of BART, we have a government actor that has willingly provided a forum for speech through Internet access.

<sup>275</sup> See discussion on U.S. municipalities providing Internet access, *supra* text accompanying notes 33-35. See also Timothy Zick, *Clouds, Cameras, and Computers: The*

development, however, is that communication through the Internet has “reinvigorated the fundamental essence of the First Amendment, namely the freedom to express one’s political beliefs.”<sup>276</sup> It is in this context that the BART cell service shutdown exemplifies the irreconcilable problems of the public forum doctrine.

In *ALA*, the Court said, “to create [a designated public forum], the government must make an affirmative choice to open up its property for use as a public forum.”<sup>277</sup> BART’s 2010 press release extolling the uses of the wireless access appears to indicate that its intent in providing the service was to allow for unlimited expressive activity, whether it be for “work or fun” by “text, talk and . . . web.”<sup>278</sup> The only restriction on the service referred to being courteous to fellow passengers, and maintaining reasonable volume.<sup>279</sup>

In holding that Internet access in public libraries is not a designated public forum, the Court considered the purpose that a public library serves, and the role that Internet access plays within that purpose.<sup>280</sup> A public library’s purpose was to “facilitate research,

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*First Amendment and Networked Public Places*, 59 FLA. L. REV. 1, 11-12 (2007). For a discussion about municipal wireless broadband in the U.S. and developing appropriate public-private partnership arrangements for communications services, see Sharon E. Gillett, *Municipal Wireless Broadband: Hype or Harbinger?*, 79 S. CALIF. L. REV. 561 (2006).

<sup>276</sup> *Opening Public Spaces Online*, *supra* note 220, at 1796; Zick, *supra* note 275, at 5 (“While we are considering First Amendment concerns, we ought also to ask how networked public places will affect core speech values, like self-government and civic interaction, in the traditional public marketplace of ideas. What will all of this networking do to public places?” (emphasis in original)); *Opening Public Spaces Online*, *supra* note 220, at 1798.

<sup>277</sup> *ALA*, 539 U.S. at 206.

<sup>278</sup> BART Expands Wireless to Downtown Oakland, *supra* note 48. However, as one scholar points out, in *ALA*, even though the libraries themselves contended that they had “provided Internet access to their patrons to facilitate communication and exchange on a ‘virtually unlimited number of topics,’” the Court nevertheless declined to call Internet access a traditional or designated public forum. Nunziato, *supra* note 32, at 1157 (quoting *ALA*, 539 U.S. at 202). Professor Dawn Nunziato adds, “In this rare instance of public ownership and control over Internet speech forums, in which the public entity acknowledges that it created the forum to facilitate the exchange of ideas and communication among members of the public on a virtually unlimited number of topics . . . If no public forum for expression is found in these circumstances, it is unlikely that a public forum will ever be recognized in the context of the Internet.” *Id.* at 1157-58.

<sup>279</sup> BART Expands Wireless to Downtown Oakland, *supra* note 48.

<sup>280</sup> *ALA*, 539 U.S. at 205-07. Moreover, the Court looked at Internet access in public libraries in the context of whether the Child Internet Protection Act violated the free

learning, and recreational pursuits by furnishing materials of requisite and appropriate quality,” and adding Internet access merely furthered that purpose, as opposed to creating a “public forum for publishers to express themselves.”<sup>281</sup> Thus, neither a public library’s collection nor the Web itself could be a “forum” for expressive purposes.<sup>282</sup> Here, although BART’s core purpose is to provide transportation services, in fact its decision-making process indicates that it *intended* to empower its riders with the ability to communicate in places that would ordinarily not have cell phone service.<sup>283</sup> This explicit enablement, coupled with the society-wide attitude that the Internet is a place for expressive activity,<sup>284</sup> is likely sufficient to overcome the presumption against the finding of a public forum.<sup>285</sup> BART provided cell phone service in part because it had been heavily relied on for

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speech clause because Congress had conditioned their funding based on installing filters for pornography. *Id.* at 209. *See* Chemerinsky, *supra* note 108, at 1144 (“[T]he Court considers whether the primary purpose of the place is for speech.”).

<sup>281</sup> *ALA*, 539 U.S. at 206 (“A public library does not acquire Internet terminals in order to create a public forum for Web publishers to express themselves, any more than it collects books in order to provide a public forum for the authors of books to speak. It provides Internet access, not to ‘encourage a diversity of views from private speakers,’ but for the same reasons it offers other library resources.”).

<sup>282</sup> *Id.*; Zick, *supra* note 275, at 24.

<sup>283</sup> *See Cell Phones Win Backing*, *supra* note 43.

<sup>284</sup> Another significant difference between the *ALA* decision, which took place in 2003, and today, is the emergence of Internet-based social media, which arguably has become the dominant method of social communication. Facebook began in 2003 but was not open to public registration until 2006. Michael Arrington, *Facebook Just Launched Open Registrations*, *TECHCRUNCH* (Sept. 26, 2008), <http://techcrunch.com/2006/09/26/facebook-just-launched-open-registrations>. Twitter was released in mid-2006. Michael Arrington, *Odeo Releases Twtr*, *TECHCRUNCH* (July 15, 2006), <http://techcrunch.com/2006/07/15/is-twtr-interesting>. As of December 2011, Facebook had 800 million active users and Twitter had 100 million active users. Shea Bennett, *Facebook, Twitter, LinkedIn—The Social Media Statistics of Today*, *MEDIA BISTRO* (Dec. 29, 2011), [http://www.mediabistro.com/alltwitter/social-media-statistics\\_b17188](http://www.mediabistro.com/alltwitter/social-media-statistics_b17188).

<sup>285</sup> Professor Erwin Chemerinsky wrote, “A place should be found to be a public forum . . . if it is an important place for the communication of messages and there are not strong reasons for closing it to speech.” Chemerinsky, *supra* note 108, at 1144. He also wrote, “Courts can find a tradition of availability to speech based on the use of that general type of property for expressive purposes. Even some incompatibility with the usual functioning of the place can be tolerated so as to accommodate First Amendment values. . . . Although a place’s primary purpose may not be for speech, it should be found to be a limited public forum if the government has opened it to some speech.” *Id.*

communication during the September 11<sup>th</sup> terrorist attacks, in addition to the fact that BART maintains its intent to provide “100 percent” seamless coverage.<sup>286</sup> Therefore, Internet access via cell phone service on BART trains and underground platforms would most likely be a designated “open” public forum that,<sup>287</sup> although it does not need to stay open indefinitely, is still subject to reasonable time, place, and manner restrictions, as well as content and viewpoint-neutrality.<sup>288</sup>

### 3. Reasonable “Place” Restrictions

The antennae that provided cell phone service for BART was disconnected, cutting off all Internet access within BART trains and stations.<sup>289</sup> Cell service aboveground was unaffected.<sup>290</sup> In this manner, BART *spatially* limited the metaphysical public forum of the Internet, as individuals could still access the forum outside of BART

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<sup>286</sup> See discussion of wiring the BART system for Internet access, *supra* text accompanying notes 43-46.

<sup>287</sup> This is the most logical conclusion despite the conceptual disparity between the Internet access policy and the speech restrictions on the train platform. A rider on the train is subject to the ban on expressive activity in paid areas (*see supra* Part II.B; Expressive Activities Policy, *supra* note 51) and yet encouraged to use the cell phone service to have unlimited access to the Internet (*see supra* Part II.A; BART Expands Wireless to Downtown Oakland, *supra* note 48). Conceivably, a rider can comply with both, if he only *receives* speech—rather than *creates* speech—on the Internet. Unlike any other type of communicative technology however, the Internet has blurred the line between creating speech and receiving speech, so this attempt to reconcile these two policies, one targeted at physical use-restrictions and the other at the metaphysical, by differentiating between creation and receipt of speech can appear counterintuitive. BART’s Internet access policy itself does not distinguish between creating and receiving speech; it encourages its use to “work or socialize” by “talk, text and . . . web,” which by necessity involves both creating and receiving speech. BART Expands Wireless to Downtown Oakland, *supra* note 48.

<sup>288</sup> See Zick, *supra* note 275, at 23 (“For the first time, governments . . . will provide and control the backbone of a communications network over which vast amounts of public communications will flow. . . . Putting wireless clouds in the sky is like building a public road *solely for communicative purposes*. This is much more akin to providing an expressive forum than a mere public utility.” (emphasis in original)).

<sup>289</sup> Letter From BART, *supra* note 69.

<sup>290</sup> *Id.* Aboveground cell service is provided by private cell phone companies through cell phone towers. Marshall Brain, Jeff Tyson and Julia Layton, *How Cell Phones Work*, HOWSTUFFWORKS.COM, <http://electronics.howstuffworks.com/cell-phone10.htm> (last visited Mar. 29, 2014).

property. BART's primary objective was to avoid overcrowding the train platforms, and accomplished this by eliminating the protesters' ability to coordinate within the BART stations. Their method did not restrict the Internet itself, nor did it affect the protesters' ability to communicate outside of BART stations. The Court would likely find that, because BART was able to achieve its goal without overbroad restrictions, the shutdown was a reasonable action, but whether BART met the other elements of the doctrine is less certain.

#### 4. *Content- or Viewpoint-Based Intent*

BART implemented the shutdown of cell phone service with explicit reference to the impending protest they were intending to prevent.<sup>291</sup> As the Court stated in *Ward*, the content-neutrality prong is analyzed based on whether the state has adopted the regulation "because of disagreement with the message it conveys," making the government's purpose the "controlling consideration."<sup>292</sup> The stated purpose of the action was to address the safety concerns that a protest of the expected size would present.<sup>293</sup> It would be hard to predict how BART would react in response to an unruly *pro*-BART protest in its stations, but the simultaneous *pro*-BART staging of "loyal riders" at a news conference on August 11, 2011, appears to indicate that BART may have been motivated by concerns other than safety.<sup>294</sup> Johnson, the BART spokesperson, also approached local television stations to try to convince them not to air coverage of the protests,<sup>295</sup> indicating that Johnson was compelled to avoid bad press, rather than by concerns for safety.<sup>296</sup> In *Turner Broadcasting v. FCC*,<sup>297</sup> Justice

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<sup>291</sup> See *supra* text accompanying notes 62-68.

<sup>292</sup> *Ward v. Rock Against Racism*, 491 U.S. 781, 791 (1989).

<sup>293</sup> "BART's top priority is to ensure the safety of its passengers." Letter From BART, *supra* note 69.

<sup>294</sup> For analysis arguing BART's actions were content-based, see Spencer, *supra* note 101, at 777-80. For analysis arguing BART's actions were content-neutral, see Fleming, *supra* note 232, at 638-41.

<sup>295</sup> *Media Manipulation Strategy*, *supra* note 79.

<sup>296</sup> One constitutional scholar argues that the Court should presume the suppression of speech was viewpoint-based because the protesters intended to condemn BART police. See Ammori, *BART SF 4*, *supra* note 219 ("[C]ourts likely would (or should) presume that a government agency is making an 'effort to suppress expression' out of disagreement with the speaker's view when the speakers' view is to criticize that very government agency.



Kennedy, writing for the majority, stated, “the mere assertion of a content-neutral purpose [is not] enough to save a law which, on its face, discriminates based on content.”<sup>298</sup> A court could point to several pieces of evidence demonstrating BART’s intent to restrict based on viewpoint when it shut down cell phone service.<sup>299</sup>

Further, it may not matter whether a court can find content-neutrality in BART’s actions. If the Court determines that BART’s action is a content-neutral restriction, the shutdown may still be found unconstitutional based on other elements of the doctrine. Though the standard for ample alternative channels has typically been easy to meet,<sup>300</sup> the protest speech failed to occur altogether, and even non-protesters, riders on trains and platforms, were unable to communicate through the closed forum. No other channel of communication existed for the protesters who had anticipated meeting on the platform at 5 p.m. that day.<sup>301</sup> Additionally, narrow tailoring requires that the means chosen do not “burden substantially more speech than is necessary to further the government’s legitimate interests.”<sup>302</sup> A court would not likely find that it was a necessary burden on speech to power down cell phone service across the entire transit system, especially in light of the fact that BART ultimately did

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Here, the protestors were specifically protesting BART’s policies and actions. They would use phones to organize the assembly; this kind of demonstration, common around the world, even has a term: a ‘flash mob.’”) (emphasis in original).

<sup>297</sup> *Turner Broad. Sys., Inc. v. Fed. Comm’n Comm’n*, 512 U.S. 622 (1994).

<sup>298</sup> *Id.* at 642-43. *But see generally* Strauss, *supra* note 197.

<sup>299</sup> For example, the BART spokesperson staged a news conference attempting to highlight “loyal riders” reading a prewritten script, or that he tried to discourage news coverage of the anticipated protest. *See supra* text accompanying notes 77-83.

<sup>300</sup> *See* discussion of ample alternative channels of communication, *supra* Part III.E.

<sup>301</sup> No channel existed for the protesters to communicate by the time they arrived at the stations, as they were expecting to have cell phone service to access the Internet, and because they did not have a makeshift method to reach each other. Though, it is possible of course for the protesters, as they did in future protests, to skip this step and meet up on the platform without having to check last-minute instructions through the Internet. The protesters also could have left the station to reacquire a cell signal, but even had they done that, it seems they were not able to reorganize themselves since no protest ultimately occurred. For additional discussion of how BART did not satisfactorily “leave open adequate alternative channels,” *see* Fleming, *supra* note 232, at 646-48.

<sup>302</sup> *Turner*, 512 U.S. at 662 (quoting *Ward v. Rock Against Racism*, 491 U.S. 781, 799 (1989)).

employ several alternate methods to address the safety concerns without the deafening impact on speech,<sup>303</sup> such as increasing the number of police officers.<sup>304</sup> Revealingly, the BART president said after the incident, “If we were faced with the exact same situation, we would not shut off cell phone service. We would arrest people.”<sup>305</sup>

If the Court finds that the shutdown was content- or viewpoint-based, it would likely fail strict scrutiny because such an action would be presumptively invalid and BART did not sufficiently narrowly tailor its actions. Its staged news conference,<sup>306</sup> coupled with other public statements and actions by BART officials, evinces a viewpoint-based intent against the anti-BART protesters. Additionally, BART’s reactions to subsequent protests, including shutting down entire stations<sup>307</sup> or deploying additional police officers and personnel, show that BART had other measures that would have not affected speech through the Internet. Thus, its shutdown was not necessary to serve a compelling interest.<sup>308</sup> BART’s shutdown of Internet access to thwart a protest was unconstitutional because BART had provided a designated “open” public forum that was likely closed due to content- or viewpoint-based intent, or alternatively, was closed in such a way that placed an overly broad burden on speech without providing “ample alternative means of communication.”

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<sup>303</sup> In a case where a speaker on a sidewalk had started to attract hecklers, Justice Black argued that the police had an obligation to protect his “constitutional right to talk.” *Feiner v. New York*, 340 U.S. 315, 326-28 (1951) (Black, J., dissenting). He wrote, “in the name of preserving order, [the police] first must make all reasonable efforts to protect him. Here the policemen did not even pretend to try to protect petitioner. . . . Their duty was to protect petitioner’s right to talk, even to the extent of arresting the man who threatened to interfere. Instead, they shirked that duty and acted only to suppress the right to speak.” *Id.*

<sup>304</sup> Poeter, *supra* note 257. BART increased the number of police officers and other personnel on call and even shut down entire stations for future protests. Temporary Wireless Service Interruption, *supra* note 73.

<sup>305</sup> *Shutdown Rules Adopted*, *supra* note 104.

<sup>306</sup> See *supra* text accompanying notes 77-81.

<sup>307</sup> See *supra* text accompanying notes 99, 257-58.

<sup>308</sup> But see *Ward v. Rock Against Racism*, 491 U.S. 781, 781 (1989), where a musical performer challenged New York City’s policy to furnish the sound equipment and a sound technician for all performances on the basis that it violated the First Amendment “because it [would] place[] unbridled discretion in the hands of city officials charged with enforcing it.” *Id.* at 793. The Court concluded that the city need not find the “least intrusive means of achieving the desired end,” and that restrictions “are not invalid simply because there is some imaginable alternative that might be less burdensome on speech.” *Id.* at 786, 797 (internal quotation marks omitted).

D. *The Train Platform with an Internet Overlay*

Another possible method to analyze the incident is to apply BART's restrictive Expressive Activities Policy in conjunction with its unrestricted Internet access policy. The incident could be analyzed based on how the two policies overlap. In other words, BART's unrestricted Internet access policy can be viewed such that it does not override the ban on expressive activity. The policy is targeted primarily at *physical* potentially disruptive activities, and states "No person shall conduct or participate in assemblies or demonstrations, distribute written pamphlets or other materials, gather petition signatures or register voters, or engage in other expressive activities."<sup>309</sup> The goal of the policy is "[t]o prevent interference and obstruction with the District's primary transportation responsibilities and to protect its facilities." The result of such a reading would likely be that a BART rider could engage in any expressive activity through the Internet as long as the rider was not planning a protest in a BART paid area.

Briefly setting aside the fact that the unrestricted Internet access policy was implemented *subsequent* to BART's more restrictive Expressive Activities Policy—which by the principles of last-in-time interpretation would mean that the new unrestricted policy would overwrite the older restrictive policy where they conflict—a court could arguably find that BART's Internet access constitutes a limited public forum, because speech was restricted by the Expressive Activities Policy, as BART's president attempted to argue.<sup>310</sup> A limited public forum allows the government to exclude speakers based on their subject matter, as long as it is reasonable and viewpoint-neutral.<sup>311</sup> As BART would argue, its actions were reasonable because it merely closed the forum of Internet access to enforce its Expressive Activities Policy. Unlike the limited public forum of the train platforms,<sup>312</sup> where the restrictions were clearly set forth based on physical boundaries within BART property, however, this limited public forum does not nearly have sufficiently clear lines of content

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<sup>309</sup> Expressive Activities Policy, *supra* note 51.

<sup>310</sup> See Letter From BART, *supra* note 69, and discussion of BART's justifications for the shutdown, *supra* note 85.

<sup>311</sup> See *supra* Part III.C.3.

<sup>312</sup> See *supra* Part IV.B.

prohibition. Even assuming a BART rider was aware that he could engage in all expressive activity over the Internet, except to organize a protest in BART paid areas, however, BART shuttered *all* access to target a small amount of speech going through the Internet over three hours, which excluded speech that “[fell] within the [predetermined] subject matter constraints of the forum,”<sup>313</sup> such as ordinary non-incitement text messages going through cell phone service. This would “subject [BART’s actions] to strict scrutiny,”<sup>314</sup> a test it would probably fail because the shutdown was not sufficiently narrowly tailored to the specific speech at issue.

The very counterintuitive approaches used above to frame the incident—in order for it to fit neatly into the public forum doctrine—convincingly demonstrate that it is past due time for a refresh.

#### V. REFRESHING THE PUBLIC FORUM DOCTRINE FOR THE INTERNET ERA

Unsurprisingly, the Internet has thrown a wrench into the gears of the public forum doctrine. While the doctrine has been fraying in several respects prior to the Internet, the BART shutdown of cell phone service has further exposed some very foundational flaws. If analyzed conventionally, the shutdown was a valid restriction on speech because the government clearly set forth its intent to create a limited forum, one that was not open to the protesters. The shutdown was merely the enforcement of BART’s intent to limit speech. However, the action was immediately greeted with vehement criticism that it was a clear violation of freedom of speech, no doubt buoyed by the recent example of Egypt shutting down the Internet to suppress speech. If analyzed with the significance of the Internet in mind, the shutdown was unconstitutional because the government restricted speech in a designated open public forum and was motivated by content- or viewpoint-based intent.

The contradictory conclusions between these two modes of analysis demonstrate a severe deficiency in the protections provided by the First Amendment as it is currently cast in jurisprudence. As Justice Kennedy wrote in his concurrence in *ISKCON*, “[O]ur failure to recognize the possibility that new types of government property

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<sup>313</sup> Lidsky, *supra* note 134, at 1989 (quoting *Ark. Educ. Television Comm’n v. Forbes*, 523 U.S. 666, 677 (1998) (“If the government excludes a speaker who falls within a class to which a designated public forum is made generally available, its action is subject to strict scrutiny.”)).

<sup>314</sup> *Id.*

may be appropriate forums for speech will lead to a serious curtailment of our expressive activity.”<sup>315</sup> One way to resolve this issue with the public forum doctrine would be to simply dispense with the ironclad definition of “traditional” and apply it to the Internet. The Court declines to include publicly-owned property other than sidewalks, streets, and parks to this category,<sup>316</sup> but when society has overwhelmingly selected a new technology to be the norm for speech, it is time to break out of the bounds of traditionalism and time immemorial.<sup>317</sup> Justice Kennedy’s concurrence continues to reverberate loudly for the instant case. He wrote:

One of the places left in our mobile society that is suitable for discourse is a metropolitan airport. It is of particular importance to recognize that such spaces are public forums because in these days an airport is one of the few government-owned spaces where many persons have extensive contact with other members of the public. [I]t is critical that we preserve these areas for protected speech. In my view, our public forum doctrine must recognize this reality, and allow the creation of public forums that do not fit within the narrow tradition of streets, sidewalks, and parks. We have allowed flexibility in our doctrine to meet changing technologies in other areas of constitutional interpretation, and I believe we must do the same with the First Amendment.<sup>318</sup>

It would, however, be unwise to continue to retrofit the public forum doctrine for the Internet era, because even though it

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<sup>315</sup> *ISKCON*, 505 U.S. 672, 698 (1992) (Kennedy, J., concurring).

<sup>316</sup> See *Opening Public Spaces Online*, *supra* note 220, at 1809.

<sup>317</sup> Justice Kennedy has given significant credence to this idea. He wrote in his concurrence to *ISKCON*: “The jurisprudence is rooted in historic practice, but it is not tied to a narrow textual command limiting the recognition of new forums. [We must] recognize that open, public spaces and thoroughfares that are suitable for discourse may be public forums, whatever their historical pedigree and without concern for a precise classification of the property. . . . Without this recognition our forum doctrine retains no relevance in times of fast-changing technology and increasing insularity.” *ISKCON*, 505 U.S. at 697 (Kennedy, J., concurring).

<sup>318</sup> *Id.* at 698 (Kennedy, J., concurring).

purportedly contains categories,<sup>319</sup> those categories are far from clear-cut in their application.<sup>320</sup> Instead of attempting to draw lines between what end up being fluid categories and getting muddled in the nomenclature, the doctrine should be overhauled to better align with social norms and public expectations. Justice Blackmun once pointed out in a dissenting opinion that the public forum doctrine was meant to balance “the interests served by the expressive activity . . . against the interests served by the uses for which the property was intended and the interests of all citizens to enjoy the property.”<sup>321</sup> Instead, he wrote, the Court has “turn[ed] these principles on end. . . . Rather than [balancing,] the Court simply labels the property and dispenses with the balancing.”<sup>322</sup> In 1972, Justice Marshall wrote, “The right to use a public place for expressive activity may be restricted only for weighty reasons.”<sup>323</sup> The BART cell phone shutdown highlights that the public forum doctrine has lost its way from the original intent of the free speech clause.<sup>324</sup>

#### A. *New Media, New Law*

The Court wrote in 1969, “differences in the characteristics of new media justify differences in the First Amendment standards applied to them.”<sup>325</sup> In what could be viewed as acknowledgement of the

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<sup>319</sup> Justice Kennedy wrote, “[The public forum doctrine] leaves the government with almost unlimited authority to restrict speech on its property by doing nothing more than articulating a nonspeech-related purpose for the area, and it leaves almost no scope for the development of new public forums absent the rare approval of the government.” *Id.* at 694-95 (Kennedy, J., concurring).

<sup>320</sup> *See supra* Part III.C.

<sup>321</sup> *Cornelius v. NAACP Legal Def. Fund*, 473 U.S. 813, 820-21 (1981) (Blackmun, J., dissenting).

<sup>322</sup> *Id.*

<sup>323</sup> *Grayned v. City of Rockford*, 408 U.S. 104, 115 (1972).

<sup>324</sup> Justice Kennedy wrote, “Our public forum doctrine ought not to be a jurisprudence of categories rather than ideas or convert what was once an analysis protective of expression into one which grants the government authority to restrict speech by fiat. I believe that the Court’s public forum analysis in these cases is inconsistent with the values underlying the Speech and Press Clauses of the First Amendment.” *ISKCON*, 505 U.S. at 693-94 (Kennedy, J., concurring).

<sup>325</sup> *Red Lion Broad. Co. v. Fed. Comm’n Comm’n*, 395 U.S. 367, 386 (1969) (in the context of broadcasting as a medium affected by First Amendment interests). *See also*

inadequacies of current First Amendment jurisprudence to handle the Internet, the Court stated in *ALA*, “we would hesitate to import ‘the public forum doctrine . . . wholesale into’ the context of the Internet. [W]e are wary of the notion that a partial analogy in one context, for which we have developed doctrines, can compel a full range of decisions in such a new and changing area.”<sup>326</sup>

Today, the Court already examines the forum’s purpose to determine what category of forum it belongs in, though because of the rigidity of the public forum doctrine, it has not played a prominent part in the analysis.<sup>327</sup> The key weaknesses of the public forum doctrine are its reliance on government intent at creation of the forum and the arbitrary distinctions between forums. Both aspects combine to give excess discretion to the government actor, fail to protect speech, and ultimately force the court to deviate beyond the original balancing test envisioned by the First Amendment and best articulated in *Grayned v. City of Rockford*.<sup>328</sup> To address these weaknesses, the Court, in concurrences and dissents, has proposed various versions of a compatibility test, whereby the court would identify the forum, be it physical or metaphysical, bypass the “which forum does this fall under?” question, and immediately ask the government to prove that the speech being restricted is incompatible to the forum. With this doctrine, the court need not label the forum “traditional,” or “designated,” or “limited,” and there is a greater emphasis on the purpose of the forum.

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Kovacs v. Cooper, 336 U.S. 77, 97 (1949) (“Each [medium] is a law unto itself.”) (Jackson, J., concurring).

<sup>326</sup> *ALA*, 539 U.S. 194, 207, n. 3 (2003) (quoting *Denver Area Ed. Telecomm’n Consortium v. Fed. Commc’ns Comm’n*, 518 U.S. 727, 749 (1996)).

<sup>327</sup> This method of analysis has hinged on whether “the manner of expression is basically incompatible with the normal activity of a particular place at a particular time.” See *Grayned*, 408 U.S. at 116. Justice Blackmun has criticized the public forum doctrine for losing its way in this manner: “Where an examination of all the relevant interests indicates that certain expressive activity is not compatible with the normal uses of the property, the First Amendment does not require the government to allow that activity. . . . Rather than taking the nature of the property into account in balancing the First Amendment interests of the speaker and society’s interests in freedom of speech against the interests served by reserving the property to its normal use, the Court simply labels the property and dispenses with the balancing.” *Cornelius v. NAACP Legal Def. Fund*, 473 U.S. 788, 820-21 (1985) (Blackmun, J., dissenting).

<sup>328</sup> *Grayned*, 408 U.S. at 116 (“The crucial question is whether the manner of expression is basically incompatible with the normal activity of a particular place at a particular time.”).

In *ISKCON*, Justice Kennedy wrote, “[I]f our public forum jurisprudence is to retain vitality, we must recognize that certain objective characteristics of Government property and its customary use by the public may control the status of the property.”<sup>329</sup> This different type of approach has been suggested by at least ten Justices, urging that the right to use public property for expressive purposes should turn on whether the speech is *compatible* with the normal functions of property.<sup>330</sup> This view of incompatibility still centers on the government’s *intended* use of the forum and “inevitably works in favor of the government because it depends on the government’s own definition of the proper uses of a forum and provides no mechanism for judicial scrutiny of the government’s choices.”<sup>331</sup> The Court currently presumes that the burden to prove compatibility is on the speaker, whereas Justice Kennedy has suggested turning this formulation on its head: speech on government property is presumptively protected unless the government proves that the speech interferes “in a significant way” with the government’s use of the property.<sup>332</sup> This approach harkens back to the 1972 case *Grayned v. City of Rockford*, where Justice Marshall wrote, “The crucial question is whether the manner of expression is basically

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<sup>329</sup> *ISKCON*, 505 U.S. at 693-94 (Kennedy, J., concurring).

<sup>330</sup> Norman T. Deutsch, *Does Anybody Really Need a Limited Public Forum?*, 82 ST. JOHN’S L. REV. 107, 119 (2008) (citing to *ISKCON*, 505 U.S. at 694-703 (Kennedy, J., concurring in the judgment, joined on this point by Blackmun, J., Stevens, J., and Souter, J.); *Greer v. Spock*, 424 U.S. 828, 843 (1976) (Powell, J., concurring); *Id.* at 860 (Brennan, J., joined by Marshall, J., dissenting); *Adderley v. Florida*, 385 U.S. 39, 54-55 (1966) (Douglas, J., joined by Warren, C.J., Brennan, J., and Fortas, J., dissenting)). See *ISKCON*, 505 U.S. at 711 (“We should classify as a public forum any piece of public property that is ‘suitable for discourse’ in its physical character, where expressive activity is ‘compatible’ with the use to which it has actually been put.”) (Souter, J., concurring).

<sup>331</sup> Steven G. Gey, *Reopening the Public Forum—From Sidewalks to Cyberspace*, 58 OHIO ST. L.J. 1535, 1560-63 (1998).

<sup>332</sup> *ISKCON*, 505 U.S. at 699 (Kennedy, J., concurring); Gey, *supra* note 331, at 1560-63 (“Kennedy thus abandon’s the Court’s emphasis on whether speech is ‘incompatible’ with the government’s own stated objectives, in favor of an ‘interference’ analysis with the burden now shifted to the government and the presumption running in favor of speech.”). See also *Adderley*, 385 U.S. at 49-51 (“The jailhouse . . . is one of the seats of governments . . . [I]t is an obvious center for protest. . . . Those who do not control television and radio, those who cannot afford to advertise in newspapers or circulate elaborate pamphlets may have only a more limited type of access to public officials. Their methods should not be condemned as tactics of obstruction and harassment as long as the assembly and petition are peaceable.”) (Douglas, J., dissenting).



incompatible with the normal activity of a particular place at a particular time.”<sup>333</sup>

In *ISKCON*, Justice Kennedy further suggested, “the inquiry must be an objective one, based on the actual, physical characteristics and uses of the property.”<sup>334</sup> This approach removes governmental intent, thereby resolving the situation where the government can suppress speech based on what type of forum it has created at the outset.<sup>335</sup> For example, referring to the *ISKCON* case, he explained that with adequate time, place, and manner restrictions in place, “expressive activity is quite compatible with the uses of major airports. . . [w]ithout any apparent interference with its ability to meet its transportation purposes.”<sup>336</sup>

Few would disagree that one of the core purposes of the Internet is to facilitate communication and expressive activity, so it would not be a stretch for the Court to first look at whether speech is incompatible with a forum’s purpose to determine free speech protections. In addition, as the Internet further solidifies its role as the primary medium for speech, the public forum doctrine’s emphasis on physical property will necessarily become less salient, or as one constitutional scholar puts it, “geography and place will become less reliable tools for restricting access and exposure to information that is harmful, offensive, or simply irritating.”<sup>337</sup> The compatibility test, however, would not advocate for the complete abandonment of the physicality of a forum; rather, the physical characteristics would factor into whether it is compatible with speech. Moreover, the compatibility test would look at the forum more holistically, rather than defining the forum as just the physical platform or just the metaphysical Internet access.

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<sup>333</sup> *Grayned*, 408 U.S. at 116. *Grayned* also cites to *Tinker v. Des Moines Independent Cmty. School Dist.*, 393 U.S. 503, 506 (1969) as a “touchstone case . . . in which [the Court] considered the question of how to accommodate First Amendment rights with the ‘special characteristics of the school environment.’” *Grayned*, 408 U.S. at 117.

<sup>334</sup> *ISKCON*, 505 U.S. at 695 (Kennedy, J., concurring). He wrote, “The Court’s error lies in its conclusion that the public forum status of public property depends on the government’s defined purpose for the property, or on an explicit decision by the government to dedicate the property to expressive activity.” *Id.*

<sup>335</sup> Caplan, *supra* note 135, at 653.

<sup>336</sup> *ISKCON*, 505 U.S. at 701 (Kennedy, J., concurring).

<sup>337</sup> Zick, *supra* note 275, at 14.

Restrictions must still maintain narrow tailoring, reasonableness and content neutrality, leaving open ample alternative means of communication.<sup>338</sup> Courts should further scrutinize whether or not an alternative channel is truly “ample” to allow speech that would otherwise be protected in a traditional public forum.

One downside to the compatibility test is that courts may arrive at very different standards of compatibility, thereby making the doctrine unpredictable and potentially resulting in varying degrees of scrutiny. The rigidity of the public forum doctrine meant that the courts would at least be cabined into a predictable and limited array of possible results.<sup>339</sup> While the flexibility of the compatibility test could be its weakness, it is nevertheless better suited for modern times because it accounts for the fact that technology will continue to change how we communicate and seek avenues for speech. Simultaneously, it adheres more closely to the original goals of the First Amendment by minimizing government intent and influence, and arguably, is more comprehensible to the layman speaker than a complex web of various forums and standards.

Under a doctrine of compatibility, BART would have to prove that the protesters’ speech was incompatible with the forum. The forum should be identified as the physical space on the train platform, combined with the metaphysical Internet access, subject to both the restrictive policy of the train platform and the unrestricted speech over the Internet. This test would not have allowed BART to preemptively suppress speech without a showing that—after it had exhausted all other methods to contain the impact—the speech would have imminently impacted BART’s transportation purposes. Given the severe disruptions caused by the July 11 protest, BART may have been able to make a case that employing more police would have been insufficient to contain the August 11 protest. Once it has proven that the speech is incompatible with the forum, however, BART would also need to prove that its actions maintain content-neutrality and reasonableness and are narrowly tailored to serve a compelling government interest. The August 11 cell phone shutdown, as discussed above, probably would not survive strict scrutiny, or satisfy the content-neutrality requirement.

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<sup>338</sup> In the 1972 case *Grayned v. City of Rockford*, Justice Marshall applied reasonableness, content neutrality and narrow tailoring after determining compatibility, all prior to the official birth of the public forum doctrine in *Perry* in 1983. *Grayned*, 408 U.S. at 114-17.

<sup>339</sup> However, scholars and courts alike have acknowledged that the doctrine has failed to produce predictable results. See criticisms of the doctrine, *supra* note 134.

## B. *BART Protests and Beyond*

As more government agencies provide publicly available Internet access,<sup>340</sup> situations will frequently arise where the agencies will face the choice of whether they should shut down that access to accomplish a governmental interest. In the future, agencies will probably place restrictive policies on speech at the outset of providing Internet access,<sup>341</sup> putting them in the limited public forum category, as BART has attempted to do with its newly-adopted Cell Service Interruption Policy.<sup>342</sup> Though the policy recognizes that “available open communications networks are critical to our . . . democracy and should be preserved to the fullest extent possible,” it still permits BART to restrict the service based on “strong evidence of . . . unlawful activity,” destruction of property, or “substantial disruption of public transit services.”<sup>343</sup> It is arguable that this policy has actually created a designated “open” public forum, since BART’s intent remains to allow public discourse to occur through their cell phone service, as long as their restrictions are reasonable. BART may close the designated “open” public forum if it maintains content and viewpoint-neutrality during the closure.

If the Court were to adopt a compatibility-based test for free speech, future interruptions of cell service would require that BART

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<sup>340</sup> See Sewell Chan, *After Delays, Wireless Web Comes to Parks*, N.Y. TIMES, July 6, 2006, <http://www.nytimes.com/2006/07/06/nyregion/06wifi.html>. See also Ryan Singel, *Google Chooses Kansas City, Kansas, as Broadband Mecca*, WIRED.COM (Mar. 30, 2011), <http://www.wired.com/epicenter/2011/03/google-fiber-kansas>; Jon Bershad, *Good News/Bad News: NY Subways To Get WiFi and Cell Phone Service*, MEDIAITE (July 30, 2010), <http://www.mediaite.com/online/good-newsbad-news-ny-subways-to-get-wifi-and-cell-phone-service>; Press Release, NJ Transit, NJ Transit Seeking Wi-Fi for Customers: Request for Proposals Issued for Provision of Wireless Broadband Service Onboard Trains and at Rail Stations (Sept. 1, 2010), available at [http://www.njtransit.com/tm/tm\\_servlet.srv?hdnPageAction=PressReleaseTo&PRESS\\_RELEASE\\_ID=2620](http://www.njtransit.com/tm/tm_servlet.srv?hdnPageAction=PressReleaseTo&PRESS_RELEASE_ID=2620).

<sup>341</sup> Alternatively, government agencies likely face similar challenges when providing a virtual platform for speech, such as allowing visitors to comment or post messages through a government-owned and operated website. See Lidsky, *supra* note 134; *Opening Public Spaces Online*, *supra* note 220, at 1816-22; David S. Ardia, *Government Speech and Online Forums: First Amendment Limitations on Moderating Public Discourse on Government Websites*, 2010 B.Y.U. L. REV. 1981 (2010).

<sup>342</sup> CELL SERVICE INTERRUPTION POLICY, available at [http://www.bart.gov/sites/default/files/docs/final\\_CSIP.pdf](http://www.bart.gov/sites/default/files/docs/final_CSIP.pdf) (last visited Mar. 29, 2014).

<sup>343</sup> *Id.*

prove that use of the Internet would have significantly interfered with their transportation goals. On August 11, 2011, in other words, BART would have needed to show that use of the Internet to organize the protest, and the protest itself, would have significantly impacted train service despite deploying their best efforts to avoid affecting speech. Given how the day played out, it is unclear whether the resultant protest would have caused more or less disruptions than the July 11 protest did.

In September 2013, as a response to the original incident, the California legislature passed a law<sup>344</sup> that prohibits state and local agencies from “shutting down a public communications network without a court order,” with exceptions for “life-threatening emergencies.”<sup>345</sup> The bill became effective on January 1, 2014.<sup>346</sup> Under this law, BART might have had difficulty justifying the August 2011 network shutdown.

The year 2011 has become known as “the year of the protest,” with revolts in Tunisia, Egypt, Libya, Bahrain, Syria and Yemen, demonstrations against economic breakdown in Greece, Italy and Spain, marches in Chile and Israel, and occupations of parks and sidewalks for the global Occupy Wall Street, to name a few.<sup>347</sup> In such a context, the BART shutdown of cell phone service may seem trivial. But, while the shutdown of Internet access did not stop the Egyptian people from casting aside their dictator, Americans living under the shadow of the present-day public forum doctrine may not be so lucky should they choose to voice their dissent as they tried to do on August 11. The First Amendment’s protections of free speech are the bedrock of American democracy, but if the one place that more and more Americans are turning to for speech can be throttled merely because it is not traditionally and historically treated as a public forum, then the First Amendment will have failed to provide any protection at all.

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<sup>344</sup> S. Bill No. 380 (Cal. 2013), *available at* [http://leginfo.legislature.ca.gov/faces/billNavClient.xhtml?bill\\_id=201320140SB380](http://leginfo.legislature.ca.gov/faces/billNavClient.xhtml?bill_id=201320140SB380).

<sup>345</sup> Bob Egelko, *New State Law Prohibits Electronic Network Shutdown*, S.F. CHRON. (Sept. 26, 2013), <http://www.sfgate.com/bayarea/article/New-state-law-prohibits-electronic-network-4848252.php>.

<sup>346</sup> Press Release, Cal. Sen. Alex Padilla, Governor Brown Signs Bill Requiring Court Order to Interrupt Wireless Communication Services (Sept. 26, 2013), *available at* <http://sd20.senate.ca.gov/news/2013-09-26-governor-brown-signs-bill-requiring-court-order-interrupt-wireless-communication-ser>.

<sup>347</sup> See, e.g., 2011: *Your Year in Pictures*, BBC NEWS (Dec. 31, 2011), <http://www.bbc.co.uk/news/in-pictures-16372561>; Harris, *supra* note 14.



